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In The

Supreme Court of the United States

JEFFREY CHEEK AND ALVIN DOTY,

Petitioners,

v.

THE CITY OF EDWARDSVILLE, KANSAS; JOHN BROMAN; JENNIFER BURNETT; TIM KELLY; DOUG SPANGLER; AND LLOYD BETH,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

G. GORDON ATCHESON
Counsel of Record
THE ATCHESON LAW OFFICE
4800 Rainbow Blvd., Suite 6
Westwood, Kansas 66205
(913) 362-8650

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

Petitioners Cheek and Doty served as majors – second in command – in the 15-person Edwardsville, Kansas police department. The Kansas Attorney General's office launched an investigation of corruption among Edwardsville officials and interviewed the two as witnesses. The City Council fired Cheek early in the probe and fired Doty after the Attorney General criminally charged the police chief and a councilmember. The lower courts held that the speech of Cheek and Doty as witnesses lacked constitutional protection under *Garcetti v. Ceballos*, 547 U.S. 410 (2006). The questions presented are:

1. Whether a public employee's statements made as a witness in an outside investigation enjoy First Amendment protection.

2. Whether a comprehensive standard for determining a public employee's job duties typically would afford constitutional protection to statements the employee makes to external agencies, an issue expressly reserved in *Garcetti*.

3. Whether the court of appeals disregarded its obligation under *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 504-05 (1984), when it affirmed summary judgment against Cheek and Doty by substituting and then rejecting an inferior First Amendment argument for the one they actually presented.

PARTIES TO THE PROCEEDINGS

Petitioners are Jeffrey Cheek and Alvin Doty. Respondents are the City of Edwardsville, Kansas; Doug Spangler, who served as the appointed city administrator; James Broman, Jennifer Burnett, and Tim Kelly, all of whom served as elected members of the city council; and, in Doty's suit, Lloyd Beth, who served as interim police chief.

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The district court's opinion granting summary judgment against Jeffrey Cheek and Alvin Doty is reported at 514 F.Supp.2d 1220 (D. Kan. 2007). The order of the court of appeals affirming summary judgment, case no. 07-3341, appears at 2008 WL 4150029, but is otherwise unpublished.

JURISDICTION

The court of appeals entered judgment on September 10, 2008. App. 1. Cheek and Doty filed a motion for rehearing and rehearing en banc, which was denied on November 17, 2008. On February 13, 2009, Justice Breyer granted Cheek and Doty an extension until April 16, 2009 to file their petition for writ of certiorari. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution provides, in pertinent part: "Congress shall make no law . . . abridging the freedom of speech[.]"

STATEMENT

1. Petitioners Jeffrey Cheek and Alvin Doty worked their way up the ranks in the Edwardsville, Kansas police department. They were appointed to the newly created positions of major – second in command to the chief – in 2004. App. 11-12. In that capacity, Cheek oversaw the uniformed officers in the 15-person department, kept departmental procedures and rules current, and handled other administrative functions. Doty, who had been a detective, coordinated investigations and performed other supervisory tasks. Either could head the department in the absence of the chief. And given the small size of the force, the two continued to make arrests and handle other routine police work. App. 13-15.

The rank-and-file officers in the police department belonged to the Fraternal Order of Police and enjoyed protection against termination except upon just cause under their union contract. Cheek, Doty, and Chief Steve Vaughan were the only commissioned officers not covered under the FOP labor agreement. App. 24.

From time to time, the police department, with Chief Vaughan's approval, would seek assistance in on-going investigations from outside law enforcement agencies. For example, the department had to enlist a polygraph operator from another agency and sometimes relied on outside personnel to help with large drug cases. App. 13, 15-16.

2. In late 2005 and early 2006, Sgt. Terry Hammontree, vice president of the FOP local, discussed with Cheek and Doty his concerns both about how some traffic citations seem to have been mishandled and about how certain city councilmembers insinuated themselves too deeply into the internal operation of the department. Cheek and Doty shared his concern. App. 19-20. Their distress stemmed from multiple events. During a lunch, Chief Vaughan told Cheek, Doty, and several city officials that Councilman Tim Kelly had tried to influence the handling of a cocaine arrest. App. 19. Councilman Kelly also had spoken to Chief Vaughan about a speeding ticket Hammontree issued to his brother in January 2006. The citation "disappeared" and never got to the municipal court for prosecution. App. 19. About that same time, Cheek and Melynda Harbour, the only civilian employee of the police department, were looking for a report in Chief Vaughan's office when they found an original driving-under-influence citation that had been missing for months and had never been forwarded for prosecution. App. 17; *Cheek v. City of Edwardsville*, 514 F.Supp.2d 1236, 1240 (D. Kan. 2007).[1]

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[1] Although bearing the same caption as this case, the cited decision actually addresses the separate suit Harbour filed over her termination. Harbour's case was consolidated for pretrial purposes with the suits Cheek and Doty filed. App. 10, 43-44.

Cheek and FOP Vice President Hammontree discussed taking those concerns to an outside investigative agency. They weighed the pros and cons of various local, state, and federal agencies. App. 20.

In the meantime, Hammontree drafted a letter on behalf of the union to the mayor and city council voicing concern about the apparent ticket-fixing and problems with certain elected and appointed municipal officials. The letter, dated January 20, 2006 and sent over a generic signature of FOP Local 42, requested a prompt response. App. 20. When none was forthcoming, Hammontree drafted and sent a second letter that upped the stakes: the union would take its concerns to the Kansas Attorney General's office if nothing were done locally to correct the problems. The mayor and City Council did nothing.

Cheek and Doty reviewed the letters before Hammontree sent them; and they pledged their support for the union's requests. But they took no other action. No police department investigation was begun. Cheek and Doty neither assembled evidence nor interviewed possible witnesses. App. 4.

3. In mid-February 2006, FOP President John Henre, who worked as a detective in the department, and FOP Vice President Hammontree traveled to the State Attorney General's office in Topeka, Kansas to lay out their view that Chief Vaughan and other Edwardsville officials had engaged in a pattern of wrongful conduct. The attorney general's office almost

immediately launched an investigation of the ticket-fixing and other issues. App. 20-21. State investigators interviewed numerous witnesses including Cheek, Doty, and Harbour. App. 21-22.

Cheek spoke with investigators numerous times both in-person and by telephone. He explained to the investigators about locating the missing DUI citation in Chief Vaughan's office. He told them about the missing speeding ticket issued to Councilman Kelly's brother and Vaughan's statement about the councilman trying to derail the cocaine case. Cheek also provided secondhand information to the effect that Councilman Robert Lane had received a kickback in the form of remodeling work on his basement in exchange for a political favor.[2] App. 21-22.

Doty provided much the same information to the investigators. App. 22. Harbour also spoke to the Attorney General's representatives and recounted finding the DUI citation in Chief Vaughan's office. *Cheek*, 514 F.Supp.2d at 1240. In mid-April 2006, Chief Vaughan went on medical leave. City Administrator Doug Spangler cleaned out Chief Vaughan's office. Doty was also present and observed several

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[2] The thrust of the information was correct: Lane had improperly used his office for personal gain. But some of the details were off. Lane actually had gone to Chief Vaughan to procure the disappearance of another DUI citation for the owner of a local carpet store. Once that mission had been accomplished, the business owner provided Lane with over a $1,000 in carpeting for his recreation room.

other original traffic citations in the chief's desk. Doty so informed the State investigators.

4. The Attorney General's investigation had become common knowledge at City Hall. Several council members spoke angrily of the probe. App. 22; *Cheek*, 514 F.Supp.2d at 1241. Cheek came to be seen as a primary catalyst for the Attorney General's investigation. Spangler shared with the elected officials various ways of discrediting Cheek and others perceived as assisting in the investigation, including firing them. App. 22; *Cheek*, 514 F.Supp.2d at 1241. Spangler also confronted Harbour directly about what she communicated to the investigators and urged her "'not to burn [Vaughan] at the stake.'" *Cheek*, 514 F.Supp.2d at 1240.

On April 3, 2006, Spangler suspended Cheek without pay. Councilmembers John Broman, Jennifer Burnett, and Tim Kelly – who constituted a majority of the body – voted to fire Cheek on May 8, 2006. App. 12. At the same meeting, they installed Lloyd Beth, a part-time codes enforcement officer, as interim chief.

Beth and Spangler met with Doty and Harbour, but no other members of the police department, to tell them they needed to join the "new organization." *Cheek*, 514 F.Supp.2d at 1241. Beth then reassigned Doty to routine patrol duties and cut Harbour's position from full-time to half-time. A few weeks later, Beth suspended Doty without pay for 14 days. *Cheek*, 514 F.Supp.2d at 1241-42.

While Doty was serving that suspension, the Attorney General's office filed criminal charges against Chief Vaughan and Councilman Lane. App. 23. The day Doty returned to work, Beth again suspended him without pay pending an ill-defined investigation. *Cheek*, 514 F.Supp.2d at 1241-42. Nearly two months later, Doty remained on suspension when the City Council fired him. The council fired Harbour the same day. App. 13, 23. Contrary to Edwardsville personnel policies, neither Harbour nor Doty received notice of the reasons for the firing or a hearing before the City Council. *Cheek*, 514 F.Supp.2d at 1243.

5. Shortly after he was fired, Cheek filed suit under 42 U.S.C. § 1983 in the U.S. District Court for the District of Kansas against the City of Edwardsville, Councilman Broman, Councilman Kelly, Councilwoman Burnett, and City Manager Spangler alleging they violated of his constitutionally protected right of free speech. Doty filed a comparable action following his termination naming the same defendants and interim Chief Beth. The district court granted summary judgment to the defendants finding that Cheek and Doty enjoyed no First Amendment protection for their communication with the Attorney General's investigators because that speech was job related within the meaning of *Garcetti v. Ceballos*, 547 U.S. 410 (2006). App. 10-11, 35-36.

The district court reached that conclusion based on three principal grounds. First, the Edwardsville police department occasionally sought help with its

own investigations from outside agencies, and Cheek and Doty often coordinated those investigations with advice from the chief. App. 32-34. But in Harbour's companion case, the court acknowledged that "the Kansas Attorney General's (AG's) office initiated an investigation at the behest of the Edwardsville Fraternal Order of Police (FOP)." *Cheek*, 514 F.Supp.2d at 1240. Cheek and Doty spoke as witnesses in that investigation. Second, the court refused to give any evidentiary weight to the absence of written job descriptions or policies requiring the majors or any other Edwardsville officer to speak to outside investigators. App. 34-35. Finally, the court noted that at deposition Doty testified that he believed that as a police officer he had a duty to cooperate with the Attorney General. App. 34. That reads too much into the testimony and confuses a moral duty or obligation with a job duty in the *Garcetti* sense. App. 63 n.4. Moreover, it disregards entirely Cheek's deposition testimony that he acted out of a moral obligation as would any citizen aware of such misconduct on the part of elected and managerial municipal officials. Id.

But for the ruling against Cheek and Doty on the *Garcetti* issue of whether their speech was sufficiently job related to lack constitutional protection, the trial court would have denied summary judgment. In Harbour's companion case, based on the same factual record, the judge found more than sufficient evidence to warrant a trial on her § 1983 claim under the

traditional *Connick/Pickering* analysis.[3] *Cheek*, 514 F.Supp.2d at 1246. As to Cheek, the trial court noted: "Plaintiff Jeffrey Cheek was arguably the primary participant in the AG's investigation within the Edwardsville Police Department and the summary judgment record contains evidence that the City wanted him gone precisely because of his involvement in the investigation." *Id.* at 1245.

The court of appeals affirmed the summary judgment in an unpublished order entered without oral argument. App. 1. The court incorrectly suggested that Cheek and Doty argued simply that communication to an outside government agency necessarily must be constitutionally protected. App. 7. Not surprising, the court rejected that argument as legally insupportable, id., and then made no further

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[3] Before *Garcetti*, a court looked at two initial issues in a public employee free speech case. First, consistent with *Connick v. Myers*, 461 U.S. 138, 143 (1983), the court asked whether the speech touches on a matter of "public concern." If so, the court then balanced the public employee's interest in speaking out with the government employer's interest in efficient operation and the disruption the speech potentially would engender. *Pickering v. Board of Education of Township High School Dist. 205*, 391 U.S. 563, 568 (1968). *See Rankin v. McPherson*, 483 U.S. 378, 384-88 (1987) (discussing and applying the standards set out in *Connick* and *Pickering*). Having cleared those hurdles, the employee must then establish a causal connection between the protected speech and the adverse employment action. The employer could assert as an affirmative defense that it would have taken the same action against the employee notwithstanding the speech. *Mt. Healthy City Sch. Dist. v. Doyle*, 429 U.S. 274, 287 (1977).

review of the record, id. But Cheek and Doty never relied on the simplistic argument the appellate court attributed to them. App. 55-57, 76-79.

REASONS THE PETITION SHOULD BE GRANTED

Summary

This Court has historically viewed the scope of public employee free-speech rights to be an issue of such importance as to command review on certiorari in cases turning on systemic legal questions. *Garcetti*, 547 U.S. at 416-17; *Rankin v. McPherson*, 483 U.S. 378, 383 (1987); *Connick v. Myers*, 461 U.S. 138, 142 (1983) (certiorari granted based on trial judge's misapplication of *Pickering v. Board of Education* and summary appellate affirmance in unpublished ruling). Coming to this Court three years after *Garcetti*, this case squarely presents the question of how job-relatedness should be decided under *Garcetti*. Although *Garcetti* discussed when a public employee's speech might be sufficiently job related to be without constitutional protection, the majority deliberately refrained from offering a comprehensive analytic model. *Garcetti*, 547 U.S. at 424. This case poses the question through a decision that deprives law enforcement officers of free-speech protection when they voluntarily provide information as witness to investigators from outside governmental agencies. The result cannot be reconciled with the outline for

constitutional protection in *Garcetti* and impermissibly degrades a fundamental right. The importance of the issue warrants review.

In the wake of *Garcetti*, the courts have split over how broadly "job duties" should be defined in measuring free-speech protection. *Compare Thomas v. City of Blanchard*, 548 F.3d 1317, 1324 (10th Cir. 2008) (The panel acknowledges that since *Garcetti*, the Tenth Circuit takes a "broad" view of communication within a public employee's job duties.) *with Davis v. McKinney*, 518 F.3d 304, 313 (5th Cir. 2008) (intra-governmental complaint protected because subject matter did not "specifically" relate to employee's job within audit department). This case reflects one of the most expansive applications of *Garcetti* to eliminate First Amendment coverage for traditionally protected public employee speech. Moreover, the result in this case conflicts with post-*Garcetti* circuit decisions acknowledging that public employees who communicate to outside government investigators or officials typically retain First Amendment protection. *Davis*, 518 F.3d at 313 ("external communications are ordinarily not made as an employee, but as a citizen"); *Lindsey v. City of Orrick, Missouri*, 491 F.3d 892, 895, 898 (8th Cir. 2007); *Freitag v. Ayers*, 468 F.3d 528, 545 (9th Cir. 2006), *cert. denied*, 549 U.S. 1323 (2007). The circuit courts also have consistently recognized that public employees' testimonial statements made as witnesses enjoy constitutional protection. *Reilly v. City of Atlantic City*, 532 F.3d 216, 231-32 (3rd Cir. 2008), *cert. denied*, ___ U.S. ___, 129 S.Ct.

1316 (2009); *Morales v. Jones*, 494 F.3d 590, 598 (7th Cir. 2007), *cert. denied*, ___ U.S. ___, 128 S.Ct. 905 (2008). There is no principled reason why statements witnesses give to outside investigators as precursors to testifying – as Cheek and Doty did here – should be denied comparable recognition. Those kinds of fissures in the application of a fundamental right require review in this Court, since the scope of that right should not hinge on the circuit in which the apparent deprivation arises. *See, e.g., Federal Election Com'n v. Beaumont*, 539 U.S. 146, 151-52 (2003); *Anderson v. Celebrezze*, 460 U.S. 780, 786 (1983) ("The conflict among the Circuits on an important question of constitutional law led us to grant certiorari."); *Bell v. Wolfish*, 441 U.S. 520, 524 (1979) ("We grant certiorari to consider the important constitutional questions raised by these decisions and to resolve an apparent conflict among the Circuits.").

Finally, in this case, the court of appeals refused to review the record as a whole to determine if the speech of Cheek and Doty came within the First Amendment. The appellate panel's cavalier approach ignores this Court's directive in *Bose v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 504-05 (1984), that judges make an independent examination of the evidence to be sure constitutionally protected speech has not been erroneously characterized as unprotected. Here, the court of appeals not only shirked that responsibility, it affirmed summary judgment by ruling on an infirm constitutional argument it

substituted for the sound one Cheek and Doty actually presented.

1. Statements of Public Employees, as Witnesses in External Investigations, Typically Should Command First Amendment Protection.

A. Before *Garcetti*, public employees enjoyed protection under the First Amendment for communications made as witnesses to investigators from outside agencies. *See Stanley v. City of Dalton, Ga.*, 219 F.3d 1280, 1289-91 (11th Cir. 2000) (deputy sheriff's statements made to agents during Georgia Bureau of Investigation (GBI) of corruption within the sheriff's department constitutionally protected); *Cooper v. Smith*, 89 F.3d 761, 765 (11th Cir. 1996) (deputy's cooperation in an on-going GBI investigation of departmental corruption plainly protected under First Amendment); *Hamer v. Brown*, 831 F.2d 1398, 1402-03 (8th Cir. 1987) (public employee invited to speak in private with outside investigative committee engages in protected speech); *Marohnic v. Walker*, 800 F.2d 613, 616 (6th Cir. 1983) (A public employee receives free-speech protection when, after being contacted by the attorney general's office, he cooperates in the agency's investigation of his employer's fraudulent billing practices.). As the Eleventh Circuit stated in *Cooper*, 89 F.3d at 766: "To allow [Sheriff] Smith to punish [Deputy] Cooper with impunity merely for speaking in a proper manner with the GBI would send a signal to public employees everywhere

that it is better to remain silent than to cooperate with those officially charged with rooting out wrongdoing in public organizations. This the law does not do." Nothing in *Garcetti* should be read to diminish that protection.

But the decisions below in this case eliminate constitutional protection for Cheek and Doty, along with any other law enforcement officers who speak as witnesses to outside investigators. Thus, for example, a local law enforcement officer witnessing physical abuse of an arrestee would be without constitutional protection for information shared with Justice Department investigators looking into a civil rights violation. The result is nearly as illogical as it is insidious. The fate of Cheek and Doty represents one of the most extreme constitutional degradations exacted in the name of *Garcetti*. In turn, this case also offers an immediate and urgent opportunity for this Court to provide necessary guidance on a pivotal point in the constitutional analysis required by *Garcetti*.

The seeds of the peculiar outcome here germinated in the uncertain soil of the majority opinion in *Garcetti*. This Court pulled back from instructing how job-relatedness should be defined or decided in determining the free speech protection afforded a public employee. While this Court sketched some general considerations, the opinion itself expressly withheld any authoritative guidance, since the parties in *Garcetti* agreed the communication at issue there was job related. *Garcetti*, 547 U.S. at 424. Nonetheless,

following *Garcetti*, whether a public employee's speech relates to her job operates as a gatekeeper to First Amendment protection. If her communication is job related, the public employee may not pass through the gate.

The post-*Garcetti* jurisprudence in the lower courts can be aptly characterized as "an unrecognizable constitutional stew" on the matter of job-relatedness. *See Gilmore v. Taylor*, 508 U.S. 333, 345 n.4 (1993) (Chief Justice Rehnquist coined the phrase to describe the dissent's constitutional analysis.). The dish varies greatly from serving to serving because the mother recipe lacks specificity. As discussed more fully in the second point, the courts have fragmented procedurally and substantively over how to determine whether a public employee's speech is job related. And some courts have applied "job-relatedness" far too expansively to extinguish what should be protected communication. The lower courts require further guidance in addressing public employees' fundamental right to free speech.

Both courts and commentators have remarked on the lack of definition the majority opinion in *Garcetti* affords on the issue of job-relatedness. "*Garcetti* changed this analysis [of public employees' free-speech rights] in ways not yet fully determined." *Davis*, 518 F.3d at 311 "[A]ll of the implications of *Garcetti* have not been developed at this point." *Id.* at 312. *See also Casey v. West Las Vegas Independent School Dist.*, 473 F.3d 1323, 1328 n.5 (10th Cir. 2007); *Morales*, 494 F.3d at 601 (Rovner, J., concurring in

part and dissenting in part). Note, "Garcetti v. Ceballos: Public Employees Left To Decide 'Your Conscience Or Your Job,'" 41 Ind.L.Rev. 187, 194 (2008) (pointing out the "varying approaches" of the "lower courts as they grapple with *Garcetti* and search for a consistent and reliable framework" to judge job-relatedness).

Without belaboring the obvious, the issue sculpts a fundamental constitutional right. *Waters v. Churchill*, 411 U.S. 661, 674 (1974) ("Government employees are often in the best position to know what ails the agencies for which they work; public debate may gain much from their informed opinions. And a government employee, like any citizen, may have a strong, legitimate interest in speaking out on public matters.") (citation omitted); *Pickering v. Board of Education*, 391 U.S. 563, 573-74 (1968). And it has done so in a way leading to inconsistent results in the lower courts in the three years since *Garcetti*. Although this Court has from time to time suggested that "percolation" in the lower courts develops a useful debate on and competing solutions to a given jurisprudential puzzle, that is not necessarily a desirable course when an essential constitutional right drains away in the process. *See, e.g., Johnson v. Texas*, 509 U.S. 350, 379 (1993) (O'Connor, J., dissenting); *Batson v. Kentucky*, 476 U.S. 79, 110-11 (1986) (Stevens, J., concurring). Moreover, given the discordant decisions below, there is little reason to suppose delay will lend clarity.

B. In *Garcetti*, 547 U.S. at 413-15, Ceballos, an assistant prosecutor in the Los Angeles District

Attorney's office, routinely reviewed and reported to his superiors on the validity of search warrants. Ceballos and his bosses broke sharply on the efficacy of a particular warrant that he believed had resulted in an illegal search. Ceballos alleged he was reassigned to a less desirable position because of that dispute in violation of his constitutional right to free speech.

The parties agreed that Ceballos's communication plainly fell within the scope of his regular job duties. *Id.* at 424.

This Court held that when a public employee speaks in the course of her job duties, that speech lacks protection under the First Amendment. *Garcetti*, 547 U.S. at 421 ("The controlling factor in Ceballos' case is that his expressions were made pursuant to his duties as a calendar deputy."). When a public employer takes disciplinary or punitive action against an employee based on such job-related communication, that action does not implicate the free-speech rights the employee retains as a citizen. *Id.*, at 422 ("When he went to work and performed the tasks he was paid to perform, Ceballos acted as a government employee[ ]"and was not insulated by the First Amendment against disciplinary action for written or oral communication made as part of his job.). While *Garcetti* offers some signposts addressing how to determine a public employee's job duties for free-speech purposes, the majority makes no effort to fashion a predictive test or set of criteria. *Garcetti*, 547 U.S. at 425; *Casey*, 473 F.3d at 1328 n.5.

But this Court cautioned that a government employee's job duties should not be read excessively broadly in an attempt to artificially curtail protected speech. *Garcetti* at 424-25. The inquiry is a "practical one" contemplating "the duties an employee actually is expected to perform," rather than what might be written in a formal job description. *Id.* That signpost would seem to point away from removing constitutional protection merely because the employee's speech might bear a peripheral relationship to some seldom-performed task.

Thus, this Court recognized that a public employee does not lose First Amendment protection simply because her speech may be "related to [her] job." *Garcetti*, 547 U.S. at 421. Rather, the speech falls outside the First Amendment only if it embraces the job duties the employee was hired to perform. *Id.* ("We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes[.]"). If, however, the public employee's speech reflects "the kind of activity engaged in by citizens who do not work for the government," the First Amendment affords protection subject to the traditional analysis of public concern, balancing of interests, and causation. *Id.* at 423.

The touchstone for constitutional protection under *Garcetti*, then, lies in whether the government employee's speech replicates speech of the type private citizens might contribute to a public (as opposed to purely personal) discourse. *Casey*, 473 F.3d at

1328. This Court offered as examples of protected speech the public school teacher who wrote a letter to the editor critical of his district's bond referendum and the clerical employee who made a sardonic, though decidedly insensitive, comment to her co-workers upon hearing of the failed assassination attempt on President Reagan.

C. The signals sent in *Garcetti* cannot be reconciled with the result in this case. And the outcome here is more than a miscarriage of justice, it is a harbinger of unwarranted judicial diminution of government employees' free speech rights and the broad public interests protected through those rights. The immediate casualties are Cheek and Doty, but the decision effectively strips law enforcement officers of constitutional protection for communication with investigators from outside agencies.

Cheek and Doty did not act as police officers or in pursuit of their job duties as majors in the Edwardsville police department when they spoke with the Attorney General's investigators about corruption within their city. The Edwardsville police department had not begun an investigation only to hand it off to the Attorney General as too big or too hot to handle. The Attorney General's office initiated the probe. Neither Cheek nor Doty interviewed witnesses themselves, gathered evidence, wrote reports, or otherwise undertook a coordinate investigation with the Attorney General. The Attorney General's office did not solicit input from Cheek or Doty on whom to charge criminally or with what offenses. In short, Cheek and

Doty performed no discernible law enforcement functions in connection with the Attorney General's investigation and prosecution of the Edwardsville officials. Rather, the two responded to investigators' questions, just as any witness might.

A public employee speaking to an investigator from an outside government agency communicates in a way private citizens also regularly communicate. Accordingly, under the guidance provided in *Garcetti*, that speech should be constitutionally protected. To continue the scenario posed earlier, suppose that just as dawn broke, several city police officers administered some street justice to a suspect – beat him severely after he had been arrested and handcuffed. Another on-duty officer witnessed but did not participate in the events. A private citizen retrieving the morning newspaper from her stoop saw the beating. And a public works sanitation crew just starting to pick up trash passed by. The shocked citizen called the FBI. Federal agents interviewed the officer-witness, the resident, and the driver of the garbage truck. All provided truthful statements inculpating the rogue officers. Does the officer-witness lack free speech protection for what he told the FBI? Nothing in *Garcetti* reasonably can be construed to suggest the officer's communication differed in degree or kind from that of the area resident. In turn, the police chief ought not be able to fire that officer in retaliation for his speech any more than he could instruct his trusted lieutenant to lodge a bogus felony theft charge against the resident. *Hartman v. Moore*, 547

U.S. 250, 256 (2006) ("[T]he law is settled that as a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions, including criminal prosecutions, for speaking out[.]"). The truck driver sits somewhere between the resident and the police officer under *Garcetti*. But it would be difficult to suggest his job duties entail reporting the misconduct either internally or externally, let alone his simply speaking as witness.

But the deprivation of free-speech rights here depends on just such a fallacious application of *Garcetti's* job-relatedness standard. The erroneous reasoning seems to go this way: Law enforcement officers investigate crimes and interview witnesses. Therefore, if an officer is *interviewed as a witness* about a crime, that must be job related. But *Garcetti* points the other way. *Garcetti*, 547 U.S. at 421 (a public employee does not lose First Amendment protection simply because his speech "concern[s] the subject matter of [his] employment."). So does logic. If Cheek and Doty were to lack constitutional protection for their speech as witnesses in an outside investigation – a reversal of their workplace roles as police officers – they presumably would also lack protection as crime victims. After all, police officers routinely deal with victims of crimes as well as with witnesses. Suppose the police chief had demanded kickbacks from Cheek and Doty on the threat he would give them falsely negative job reviews. That would amount to theft or blackmail under state law. K.S.A.

21-3428 (blackmail); K.S.A. 21-2701(a)(3) (theft). Would the officers lack constitutional protection for reporting the shakedown to the Attorney General?

The question, of course, is more than rhetorical, especially given the lower court's exceedingly broad characterization of the officers' "duties" for purposes of the *Garcetti* analysis. The court suggested it could "envision" no circumstance in which Cheek or Doty would enjoy constitutional protection for their communication with the Attorney General's office. App. 32. That sort of wholesale cancellation of the First Amendment for Cheek and Doty and, by plain analogy, other law enforcement officers runs counter to this Court's guidance in *Garcetti* calling for a particularized analysis of the given employee's work and function within the governmental employer's business. 547 U.S. at 424-25. The decisions below effectively create as a matter of law a blanket job duty attributable to all law enforcement officers: You shall speak with investigators from any outside governmental agency. But that would be precisely the sort of artificial job requirement the *Garcetti* majority decries in its riposte to the dissenters' concern that government employers could create all-encompassing work descriptions to disable their employees' free speech rights.[4] *Garcetti*, 547 U.S. at 424-25; *id.* at 431 & n.2 (Souter, J., dissenting).

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[4] In certain specific circumstances, an officer's statements to outside investigators *might* be sufficiently job-related as to be

(Continued on following page)

The Court should grant the petition to correct the misapplication of *Garcetti* in this case and to provide more definite and detailed guidance to the lower courts on how job-relatedness should be determined.

2. The Lower Courts Cannot Agree on How to Apply *Garcetti* to Define Public Employees' First Amendment Rights.

A. The lower courts have broken into two camps in determining whether a public employee's speech is job related within the meaning of *Garcetti*. Some courts take a "broad" view and consider peripheral, irregular, or even unique activities sufficiently connected to a job to lack constitutional protection. Other courts have adopted a "narrow" approach and extend

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without First Amendment protection. As for example, a chief of police could order a subordinate officer to submit to an interview with law enforcement personnel from another agency. The order arguably could strip the communication of free speech protection depending on the other circumstances. Likewise, a county jail might adopt a policy requiring that any jailer report prisoner abuse directly to the district attorney's office, bypassing any internal reporting to avoid later charges of a cover-up or whitewash. A jailer making such a report probably lacks constitutional protection under *Garcetti*. But it is hardly clear that another jailer contacted by the district attorney's office in the course of the investigation would similarly lack free speech protection based on that policy. Factually, this case presents no comparable scenario. This Court, therefore, need not fashion a legal rule addressing those case-specific nuances to afford appropriate relief here and to offer meaningful guidance on how *Garcetti* should be applied generally to government employees' communications to outside agencies.

Garcetti only to usual or customary duties of a position. Those competing and conflicting applications of *Garcetti* necessarily result in markedly different measures of First Amendment protection for public employees. And, of course, both cannot be correct.

The Tenth Circuit and the Seventh Circuit typify the broad application of *Garcetti* that treats even atypical communications of public employees as job related and, therefore, without First Amendment protection. *See Thomas*, 548 F.3d at 1324 ("This Court's precedents since *Garcetti* have taken a 'broad' view of the meaning of speech that is 'pursuant' to an employee's 'official duties.'"); *Brammer-Hoelter v. Twin Peaks Acad.*, 492 F.3d 1192, 1203 (10th Cir. 2007). The Tenth Circuit interpreted *Garcetti* as encompassing "speech [that] concerns an unusual aspect of an employee's job that is not part of his everyday functions." *Brammer-Hoelter*, 492 F.3d at 1203. The Tenth Circuit would deny constitutional sanctuary to speech so long as it "is generally consistent with" the speaker's job duties. *Id.* The lower courts in this case relied heavily on the *Brammer-Hoelter* spin of *Garcetti*. App. 29-31 (district court); app. 7 (court of appeals affirms the "comprehensive and thorough orders" of the trial judge granting summary judgment). Similarly, the Seventh Circuit has held that a public employee steps outside the First Amendment if her speech even remotely touches on her work. *Davis v. Cook County*, 534 F.3d 650, 654 (7th Cir. 2008) (nurse's internal memo about patient care issue unprotected, although no specific job duty

required such assessment). While the *Davis* court acknowledged that making those reports "may not be a core job function of a nurse," it found that standard "too narrow after *Garcetti*[.]" *Id.* (citing *Spiegla v. Hull*, 481 F.3d 961, 966 (7th Cir. 2007)).

Conversely, the Fifth Circuit has construed *Garcetti* much more narrowly and has limited its rule to common or usual tasks a public employee might perform as part of her job. *Davis*, 518 F.3d at 315. There, an audit manager at the University of Texas made a written complaint to the school's president about the organizational structure of the administration and excessive personnel costs. The court of appeals held the speech to be constitutionally protected, since "the topic does not relate to . . . the internal audit department specifically." *Id.* The court found some of Davis's other speech unprotected because it fell within her "core job description." *Id.* Thus, the Fifth Circuit looked to a government employee's "core" functions to allocate First Amendment protection – precisely the standard the Seventh Circuit has branded incompatible with *Garcetti*. The Ninth Circuit has also favored a narrow application of job-relatedness. *Marable v. Nitchman*, 511 F.3d 924, 933 & n.13 (9th Cir. 2007). The court rejected "as unconvincing" the defendant's argument that a ferry engineer's speech lacked protection because it had "purported links to safety issues" and, thus, was job related. The engineer's work duties, however, entailed only the safe operation of his ship's mechanical system. His complaint addressed financial irregularities

that might in an attenuated way influence some safety considerations. *See also Morales*, 494 F.3d at 603 (Rovner J., concurring in part and dissenting in part) (police officer spoke as private citizen rather than pursuant to job duties when he informed an assistant district attorney of corruption within the police department).

The division is quite real and well defined. Delay is unlikely to further the debate in any appreciable way. This Court ought to address the issue of how best to determine job relatedness for First Amendment purposes. The right at stake is too important to do otherwise, and this case presents exactly what *Garcetti* did not – a genuine controversy turning on the scope-of-duty question.

Moreover, this case represents a particularly far-reaching and unjustifiable extension of *Garcetti*. But it is not singularly so. For example, in *Omokehinde v. Detroit Board of Education*, 563 F.Supp.2d 717, 728 (E.D. Mich. 2008), a district judge found that a school district employee lacked free-speech protection for a letter she sent to a local newspaper repeating internal complaints she lodged about the misuse of district funds. The letter provided the impetus for an expose and for the employee's termination. The court held that because the speech related to the employee's job duties and, therefore, enjoyed no constitutional protection when communicated internally, it must be treated the same when communicated externally to a newspaper reporter. *Id.* at 728 ("This Court fails to see how the broader

dissemination of precisely the same speech alters the fundamental nature of the underlying communication, such that what was once a part of the employee's official duties becomes the speech of a private citizen."). But that rationale, of course, disregards the overarching principle of *Garcetti* – the First Amendment covers public employee speech that replicates private citizen speech. Both speaking as a source for a newspaper reporter and as a witness for a state investigator fit that bill. This case and *Omokehinde* eliminate the need to conjure a hypothetical parade of horribles to entice this Court to act. The parade is both real and alarming.

While arguments over the propriety of a broad versus narrow application of job relatedness is more the stuff of a merits brief, the language and tenor of *Garcetti* tend toward denying free-speech protection only to quotidian duties rather than to the exotic or vestigial. *Garcetti*, 547 U.S. at 423 (free speech not implicated when employee "is simply performing his or her job duties"); *id.*, 424-25 (inquiry focuses on "the duties an employee actually is expected to perform"). *See also* Note, "A Principled Limitation on Judicial Interference: *Garcetti v. Ceballos*, 126 S.Ct. 1951 (2006)," 30 Harvard J. Law & Pub. Policy 1047, 1057 (2006) (reading *Garcetti* as instructing that "lower courts should conduct a 'practical inquiry' to determine if making a particular statement is really *an essential part* of the employee's duties") (emphasis added). Those signposts suggest many of the courts are heading down the wrong path.

To outward appearances, many of those courts advancing a broad reading of *Garcetti* and a concomitant diminution of free-speech rights have done so by seizing on this Court's reflection that the job-relatedness inquiry "is a practical" one. They have treated "practically" as an invitation to eliminate constitutional protection for virtually any communication public employees might voice within the hierarchy of the government for which they work. *See, e.g., Brammer-Hoelter*, 492 F.3d at 1204 (invoking "a practical view" to deny First Amendment protection to the vast majority of communication at issue). And in this case, the lower court went even further by eliminating protection law enforcement officers have in speaking as witnesses with investigators or officials from *other* governmental entities. App. 31.

B. After *Garcetti*, the courts have commonly recognized that a government employee communicating with officials from another public entity about misconduct retains First Amendment protection for that speech. In *Freitag*, 468 F.3d at 545, the Ninth Circuit found that the First Amendment shielded a corrections officer from her bosses' retaliation for speaking to a legislator and executive branch inspectors about misfeasance at the prison where she worked. The "right to complain both to an elected public official and to an independent state agency is guaranteed to any citizen in a democratic society regardless of his status as a public employee," according to the Ninth Circuit. *Id.* Like Cheek and Doty, Freitag cooperated in the inspector general's

investigation of her employer – speech the court of appeals held protected. *Id.*

The Eighth Circuit held that the director of public works in a small Missouri city could not be disciplined for communicating with the state attorney general's office about the city council's violations of the Missouri open meetings statutes. *Lindsey*, 491 F.3d at 896-98. The Tenth Circuit has also held that generally such external communication enjoys First Amendment protection. *Thomas*, 548 F.3d at 1326; *Casey*, 473 F.3d at 1332-33. In *Casey*, the court of appeals acknowledged constitutional protection to be the norm in those circumstances. *Casey*, 473 F.3d at 1331 (denial of protection dependent upon "narrower and subtler" facts establishing external reporting to be part of job duties). Much as in *Lindsey*, a school superintendent engaged in protected speech when she reported the board's open meetings violations to the New Mexico attorney general. *Id.* at 1332-33. But the court also held that the school superintendent did not engage in First Amendment speech when she reported financial irregularities in the district's Head Start program to federal authorities. In that instance, the superintendent had been appointed the chief operating officer of the program under federal regulations, a designation conferring specific oversight and reporting duties. *Id.* at 1331.

Last year, the Fifth Circuit surveyed that developing case law and concluded: "If . . . a public employee takes his job concerns to persons outside the work place in addition to raising them up the chain of

command at his workplace, then those external communications are ordinarily not made as an employee, but as a citizen." *Davis*, 518 F.3d at 313. The result here cannot be rationally reconciled with those decisions or with *Garcetti's* discussion of job duties as defining the measure of the First Amendment extended to government employees in the workplace. No evidence suggests Cheek and Doty had a job-related task of voluntarily answering questions put to them by a state government investigator probing municipal corruption involving the chief and their elected bosses. The trial court noted the absence of any pertinent job descriptions or police department policies that could be construed to require officers to cooperate in outside investigations of municipal misconduct. App. 34-35. The court, however, incorrectly read *Garcetti* to say that written descriptions of a government employee's duties should be given no weight. And the court of appeals readily endorsed that specious reasoning. This Court, of course, recognized written lists of job duties or practices associated with a given position must be tempered by the reality of what the employee actually does. But that is hardly the same as saying the absence (or presence) of an activity in a job description deserves no evidentiary weight – especially in opposition to a motion for summary judgment.

Similarly, the lower court, again with the later approval of the appellate court, pointed to evidence that the Edwardsville police department sometimes called on outside law enforcement agencies to provide

logistical support for ongoing investigations. In those instances, the police department had begun official investigations of crimes that taxed the resources of a 15-person department and sought assistance from larger law enforcement agencies. Also, in rare instances, an official investigation would point toward federal crimes, and the case would be handed off to an appropriate agency. But those situations all involved active police investigations in which the chief approved coordination with an outside agency. App. 33-34. The lower courts – apparently looking through the prism of practicality – found those circumstances to be comparable to what happened here. The conclusion approaches the bizarre. No official police department investigation of the apparent municipal corruption had been initiated. Cheek and Doty did not contact the Attorney General's office – the union representatives did. That was not an official departmental request for assistance with a continuing investigation, but a request from concerned individuals that circumstances suggesting municipal corruption be examined in the first instance. *Cheek*, 514 F.Supp.2d at 1240 ("The Kansas Attorney General's office initiated an investigation at the behest of the Edwardsville Fraternal Order of Police."). The communications here illustrate this Court's conclusion in *Waters*, 411 U.S. at 674, that those inside government often have the best vantage point for observing the ills plaguing that government. Once the Attorney General's office began looking into the corrupt practices in Edwardsville, investigators naturally interviewed witnesses, including Cheek and Doty. The

lower courts held those statements to be undeserving of constitutional protection. That *Garcetti* is susceptible of supporting such an unlikely degradation of free-speech rights invites review here.

C. In the post-*Garcetti* world of free speech, government employees giving testimony in judicial proceedings retain First Amendment protection. For example, in *Morales*, 494 F.3d at 598, the Seventh Circuit held that testimony a police officer gave in a civil deposition received constitutional protection, although that testimony recounted, in large measure, intra-departmental warnings he made, which fell outside the First Amendment based on *Garcetti*. The court noted that the officer was not employed to testify in civil depositions even though the subject matter concerned his work. Similarly, the Third Circuit held a police officer's testimony for the prosecution in a criminal trial retained free speech protection. *Reilly*, 532 F.3d at 228.

Those outcomes seem relatively unremarkable even after *Garcetti*, since private citizens also routinely testify. *Reilly*, 532 F.3d at 228, 231 (court testimony partakes of a societal obligation of citizenship). But those cases cannot be reconciled with the result here denying Cheek and Doty constitutional protection for their communication as witnesses with investigators from the Kansas Attorney General's office. Before a person testifies, she will be interviewed

and otherwise vetted.[5] Frequently that process entails multiple meetings, debriefings, and preparation – initially by investigators or paralegals gathering information and then lawyers orchestrating evidentiary presentations. Affording government employees First Amendment protection for their testimony as witnesses *without* likewise shielding their preparatory communication with outside investigators or lawyers makes no sense.

The outcome of such an application would be perverse. A government employer could take retaliatory action against an employee with impunity – not for her damning testimony – but for having talked during the preliminary stages of an investigation. And a witness interviewed, though not called to testify in a bow to expediency over cumulative evidence, would be left open to retaliation. The rule of *Garcetti* cannot have been conceived as endorsing such illogic.[6]

D. In addition, *Garcetti* has the left the lower courts in a quandary about how job relatedness should be applied procedurally. Some appellate courts

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[5] Only a reckless or foolish lawyer would call a witness in an evidentiary hearing or at trial without thoroughly interviewing her beforehand.

[6] Neither Cheek nor Doty have had occasion to testify in court about corruption in Edwardsville, since Councilman Lane entered a guilty plea to amended charges and the case against Chief Vaughan remains mired in pre-trial proceedings. *See State v. Vaughn* [sic], ___ Kan. ___, 200 P.3d 446 (2009).

characterize the job duty inquiry as a mixed question of fact and law. *Reilly*, 532 F.3d at 227. Others treat it as a pure question of law. *Brammer-Hoelter*, 492 F.3d at 1202-03. *See also Posey v. Lake Pend Oreille School*, 546 F.3d 1121, 1127-29 (9th Cir. 2008) (outlining split among the circuit courts). The distinction is more than cosmetic. Those courts considering it as a mixed question are more likely to deny a government employer's motion for summary judgment in deference to jury determination of the historical facts surrounding the employee's job duties. *Posey*, 546 F.3d at 1129 ("[T]he scope and content of a plaintiff's job responsibilities can and should be found by a trier of fact[.]"). The courts in the pure-legal-issue faction appear far more willing to grant summary judgment even in the face of competing renditions of the employee's duties. *Brammer-Hoelter*, 492 F.3d at 1206 & n.6.

The courts also take varied approaches on how the *Garcetti* inquiry should be incorporated into the traditional public employee free-speech analysis entailing a public concern determination followed by the *Pickering* balancing of interests. *Compare Davis*, 534 F.3d at 652-53 (A finding that speech is job related obviates the traditional *Connick-Pickering* determination.); *Brammer-Hoelter*, 492 F.3d at 1202 (characterizing job relatedness as a new and distinct criterion in First Amendment analysis) *with Andrew v. Clark*, ___ F.3d ___, ___ (4th Cir. 2009), slip op. at 12 (suggesting that *Garcetti* did not significantly alter traditional *Pickering* analysis); *Marable*, 511 F.3d at

929; *Casey*, 473 F.3d at 1328 (*Garcetti* to be applied through "public concern" component of traditional analysis). Although those variations owe more to appearance than substance, they do further highlight the instability among the lower courts after *Garcetti*.

3. The Court of Appeals Abdicated its Constitutional Duty to Make a Searching Review of the Record to Insure Free Speech Rights Had Been Properly Protected.

The courts – as the ultimate guardians of the Constitution – must make a searching review of the record in cases implicating free speech to insure that the resulting judgment does not impermissibly impair that fundamental right. In a case pivoting on the constitutional protection to be afforded the speech at issue, "the [Supreme] Court has regularly conducted an independent review of the record both to be sure that the speech in question actually falls within the unprotected category and to confine the perimeters of any unprotected category within acceptably narrow limits in an effort to ensure that protected expression will not be inhibited." *Bose*, 466 U.S. at 505. That examination is not an optional exercise, but a constitutional mandate. *Id.* at 510-11. The right of free speech is too precious a jewel to be guarded any less vigilantly. *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949) ("The right to speak freely . . . is therefore one of the chief distinctions that sets us apart from totalitarian regimes.").

This Court has applied that duty of exacting review to cases resting on a public employee's right to First Amendment protection. *Rankin*, 483 U.S. at 386 & n.9 (citing *Bose* and noting the courts "are compelled" to examine independently whether the statements at issue command First Amendment protection). There is no reason the rule should be otherwise, since the examination aims to confirm whether or not the speech comes within the First Amendment and, thus, applies across the spectrum of communication from the obscene and "fighting words" to core political expression. Thus, *Garcetti* does not relax that obligation, and nothing in this Court's decision could be read otherwise.

In this case, however, the court of appeals abdicated its constitutional obligation and, in doing so, disdained *Bose*, *Rankin*, and the First Amendment itself. The appellate court not only failed to make an independent review of the speech's constitutional protection, it also affirmed the judgment against Cheek and Doty by rejecting as deficient an inferior argument they never presented.

This Court should grant the petition and remand, if for no other reason than to require that the lower court make a fair determination from the full record whether Cheek and Doty presented sufficient evidence to show their speech as witnesses enjoyed constitutional protection so as to survive summary judgment. This Court could (and should) summarily take that step even if it were inclined to deny full review on the other questions presented. Such a

decision would safeguard the integrity of the requirement set out in *Bose* that the courts affirmatively act to insure speech deserving of constitutional protection receives due consideration. And, in turn, it would insure the fundamental values embodied in the free speech clause remain vibrant.

The appellate opinion below misrepresents Cheek and Doty as arguing that the Tenth Circuit's decision in *Casey* creates a rule "that intra-agency reporting is not protected [under the First Amendment], while a report to an outside agency is protected[.]" *Order* at 6. And the panel then dismisses that facile distinction as a constitutionally unsound argument for reversal. *Id.* at 7. Indeed, it would have been as an absolute statement of the law. Without further review or analysis, the court of appeals affirmed the summary judgment. *Id.* at 6-7.

But Cheek and Doty made no such argument. Even if they had, the court of appeals shirked its duty under *Bose* to examine independently whether the speech should receive constitutional protection.

In actuality, Cheek and Doty devoted an entire section of their appellate brief to a detailed analysis of *Casey*, in part, because the trial judge in this case gave the decision short shrift and, in part, because it is perhaps the most instructive opinion from any circuit addressing *Garcetti's* job-duty standard for assessing protected speech of public employees. In *Casey*, the Tenth Circuit pointed out that Casey, as a school superintendent, had been designated the chief

executive officer of the district's Head Start program and, therefore, had specific reporting functions grounded in federal regulation. Accordingly, Casey acted within her job duties in reporting financial irregularities in the Head Start program to federal regulators. The Tenth Circuit held that communication unprotected under *Garcetti*. Conversely, the court held Casey enjoyed First Amendment protection when she reported the school board's violation of the New Mexico open meetings statute to the State Attorney General. See, supra, at 28-29.

As Cheek and Doty explained to the Tenth Circuit:

> The [*Casey*] Court carefully distinguished its holding from the run of cases in which public employees speak to outside agencies and pointed to the 'rather narrower and subtler set of facts' defining Casey's job as the overseer of the Head Start program. *Id.* [*Casey*, 473 F.3d at 1330-31] Indeed, the Court's analysis of Casey's communication with the New Mexico Attorney General about the open meetings violations provides an apt counterpoint illustrating the more common scenario. Cheek's and Doty's communications are legally comparable to Casey's statements to the state attorney general on the open meetings violations, rather than to her report to the federal government on the Head Start irregularities.

Brief at 40-41 (paragraph break omitted). Just how the appellate panel reduced that analysis into some

sort of argument for a per se rule affording constitutional protection to all external communication seems, at the least, baffling.

More to the point, however, *Bose* required the court of appeals to look beyond the ersatz argument it chose to address and even the genuine argument Cheek and Doty presented to engage in a full review of the record in assessing the constitutional protection the officers deserved as witnesses in the Kansas Attorney General's investigation of municipal corruption. By failing to do so, the Tenth Circuit impermissibly disregarded the mandate of *Bose* and necessarily shortchanged the First Amendment.

CONCLUSION

The petition for writ of certiorari should be granted and the case set for full briefing on the merits; alternatively, on point 3, the order of the court of appeals should be summarily vacated and the case remanded for further consideration as to whether Cheek and Doty acted within their job duties when they spoke as witnesses.

Respectfully submitted,

G. GORDON ATCHESON

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JEFFREY CHEEK;
ALVIN DOTY,

Plaintiffs-Appellants,

v.

CITY OF EDWARDSVILLE, KANSAS; JOHN BROMAN; JENNIFER BURNETT; TIM KELLY; DOUG SPANGLER; LLOYD BETH,

Defendants-Appellees.

No. 07-3341
(D.C. No. 2:06-CV-02210-JWL)
(D. Kan.)

ORDER AND JUDGMENT*

(Filed Sep. 10, 2008)

Before **TACHA**, **PORFILIO**, and **TYMKOVICH**, Circuit Judges.

* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

Plaintiffs Jeffrey Cheek and Alvin Doty, former police officers with the City of Edwardsville (City), filed suit under 42 U.S.C. § 1983, alleging they were discharged because they cooperated with the Kansas Attorney General (AG) in an investigation into public corruption by City officials. They also brought state-law claims asserting that the City breached its employment contracts with them by failing to pay severance benefits. The district court entered summary judgment in favor of defendants on plaintiffs claims that they were discharged in violation of their First Amendment right to freedom of speech. *Cheek v. City of Edwardsville,* 514 F. Supp. 2d 1220 (D. Kan. 2007). In a separate order, the district court granted summary judgment to defendants on plaintiffs' breach-of-contract claims. *Cheek v. City of Edwardsville,* 514 F. Supp. 2d 1251 (D. Kan. 2007). The court later denied plaintiffs' motion to alter or amend the judgment. We exercise jurisdiction under 28 U.S.C. § 1291 and affirm.

Background

The district court provided a detailed summary of the facts and procedural history involved in this case, and we need not restate that material here. Briefly, plaintiffs were City police officers who were promoted to the newly-created position of major in 2004. As majors, their job duties included investigating criminal cases and internal affairs. Plaintiffs and other City officers regularly sought assistance from outside law-enforcement agencies, such as the Kansas

Bureau of Investigation or the Federal Bureau of Investigation. At the relevant time, defendant Spangler was the City Administrator, and defendants Broman, Burnett, and Kelly were members of the City Council. Defendant Beth was appointed Interim Police Chief to replace Police Chief Steve Vaughan while the corruption investigation was pending.

In late 2005 or early 2006, plaintiffs discovered evidence that Chief Vaughn and Councilman Kelly had improperly influenced criminal and traffic charges in order to help their friends and relatives. The standard procedure was to report these allegations to the Chief of Police, but given the fact that he was implicated, plaintiffs instead decided that the best procedure was to have a police-union representative report the allegations to the Kansas AG. In February and March of 2006, both plaintiffs provided information to the AG's office concerning the investigation. The City Council discharged plaintiff Cheek on May 8, 2006; the Kansas AG's office filed criminal charges against Chief Vaughan and Councilman Lane on July 28, 2006; and the City Council discharged plaintiff Doty on September 28, 2006.[1] Plaintiffs filed suit asserting that they were fired in retaliation for exercising their First Amendment right to free speech. Plaintiffs also brought state-law claims for breach of contract based on the City's refusal to honor

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[1] Defendants Broman, Burnett, and Kelly voted to discharge plaintiff Cheek. Plaintiff Doty does not identify the Council members who voted to discharge him.

the clause in each plaintiff's contract providing for severance pay equal to two years' salary upon discharge.

The district court granted summary judgment in defendants' favor on plaintiffs' § 1983 claims, holding "as a matter law that plaintiff Cheek and Doty's speech was made pursuant to their official duties rather than as citizens, and therefore that speech is not entitled to protection under *Garcetti* [*v. Ceballos*, 547 U.S. 410 (2006)]." *Cheek*, 514 F. Supp. 2d at 1232. *Garcetti* held that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Garcetti*, 547 U.S. at 421. In a separate memorandum and order, the court granted summary judgment to defendants on the contract claims, primarily because the severance provision was not enacted as an ordinance, as required by a Kansas statute, Kan. Stat. Ann. § 15-204 (applying to cities of the third class, such as the City of Edwardsville). *Cheek*, 514 F. Supp. 2d at 1255-56.

On appeal, plaintiffs assert that they participated in the investigation conducted by the Kansas AG as citizens, not as police majors, so their speech falls outside *Garcetti*'s purview and is entitled to constitutional protection. They argue that they did not initiate an investigation, interview witnesses, or otherwise gather evidence regarding City officials' illegal conduct. They further contend that their

contact with the AG's office was not part of their job duties and was not included in their job descriptions. For their breach-of-contract claims, plaintiffs maintain that the district court erred in holding that the severance provisions were not enforceable because they were enacted by resolution, rather than by ordinance. They point out that the City set the salaries of many City employees by resolution.

Standards of Review

"We review the district court's grant of summary judgment for the City de novo, applying the same legal standard as the district court." *Shero v. City of Grove,* 510 F.3d 1196, 1200 (10th Cir. 2007). Summary judgment is proper when "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). "Furthermore, because this case involves the First Amendment, we have an obligation to make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression." *Brammer-Hoelter v. Twin Peaks Charter Acad.,* 492 F.3d 1192, 1201 (10th Cir. 2007) (quotation omitted). We also review de novo the district court's application and interpretation of Kansas state law. *Copeland ex rel. Copeland v. Toyota Motor Sales U.S.A., Inc.,* 136 F.3d 1249, 1250 (10th Cir. 1998).

Discussion

Among plaintiffs' challenges to the summary judgment on their First Amendment claims is their contention that the district court failed to give adequate consideration to this circuit's recent application of *Garcetti* in *Casey v. West Las Vegas Independent School District,* 473 F.3d 1323 (10th Cir. 2007). Plaintiffs assert that in *Casey* this circuit developed a distinction between an internal-agency report, which is not protected speech, and a report to an outside investigative agency, which commands constitutional protection. But even assuming for the sake of argument that the Kansas AG's office qualified as an outside agency in this case, *Casey* does not stand for the blanket proposition that any report to an outside agency is entitled to protection under the First Amendment.

In *Casey,* the plaintiff was the superintendent of schools who also supervised the state's Head Start Program. She directed a subordinate to report violations of the Head Start qualifying-income regulations to the federal Head Start agency, and she reported violations of the state open-meetings law to the state attorney general. 473 F.3d at 1326. Because the report to the Head Start agency was part of the plaintiff's job responsibilities, it was not entitled to First Amendment protection. *Id.* at 1329-32. In contrast, her report to the attorney general of open-meetings violations "fell sufficiently outside the scope of her office to survive even the force of the Supreme Court's decision in *Garcetti.*" *Id.* at 1332-33.

Plaintiffs argue that intra-agency reporting is not protected, while a report to an outside agency is protected, but *Casey*'s rationale was based not on the nature of the agency, but on the nature of the plaintiff's job duties. Having reviewed *Casey* in light of plaintiffs' claims, we conclude that the district court's failure to discuss *Casey* in a substantive manner is not reversible error because, as explained above, *Casey* does not support plaintiffs' argument that it is the nature of the agency that determines whether the speech at issue is protected.

As for plaintiffs' remaining arguments, we have carefully considered them in light of the record on appeal, the parties' briefs, and the relevant law. Applying the standards set out above, we conclude that plaintiffs have not identified any reversible error in this case. Accordingly, we affirm the district court's comprehensive and thorough orders granting summary judgment in favor of defendants for the reasons stated in its published memoranda and orders filed August 24, 2007, and October 1, 2007, *Cheek,* 514 F. Supp. 2d 1220; *Cheek,* 514 F. Supp. 2d 1251, as well as in its unpublished order filed November 21, 2007, denying plaintiffs' motion to alter or amend the judgment.

Conclusion

The judgment of the district court is AFFIRMED.

Entered for the Court

John C. Porfilio
Circuit Judge

IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

JEFFREY CHEEK,

Plaintiff,

v.

THE CITY OF EDWARDSVILLE, KANSAS, et al.,

Defendants.

CONSOLIDATED CASES

Case No. 06-2210-JWL

ALVIN DOTY,

Plaintiff,

v.

THE CITY OF EDWARDSVILLE, KANSAS, et al.,

Defendants.

Case No. 06-2445-JWL

MELYNDA HARBOUR,

Plaintiff,

v.

THE CITY OF EDWARDSVILLE, KANSAS, et al.,

Defendants.

Case No. 06-2459-JWL

MEMORANDUM AND ORDER

(Filed Aug. 24, 2007)

Plaintiffs Jeffrey Cheek, Alvin Doty, and Melynda Harbour were formerly employed by the police department of the defendant City of Edwardsville, Kansas. These consolidated cases arise from their allegations that the City terminated their employment because they cooperated with an investigation by the Kansas Attorney General's office relating to public corruption among City officials. All three plaintiffs assert claims that the City's termination of their employment violated their First Amendment rights as protected by 42 U.S.C. § 1983. Plaintiffs Cheek and Doty also claim that the City breached their respective employment contracts by failing to pay them severance benefits. And, plaintiff Harbour contends that the City violated her rights under the Family and Medical Leave Act (FMLA), 29 U.S.C. §§ 2601-2654, by wrongfully refusing her FMLA leave and by terminating her employment in retaliation for requesting FMLA leave.

This matter is currently before the court on defendants' motions for summary judgment (doc. #95 in Case No. 06-2210 and doc. #27 in Case No. 06-2445) as to plaintiffs Cheek and Doty's claims. For the reasons explained below, the court will grant defendants' motions for summary judgment as to plaintiffs Cheek and Doty's § 1983 claim on the grounds that they do not have an actionable First Amendment retaliation claim because their asserted protected speech was made pursuant to their official

employment duties rather than as citizens. As to plaintiffs Cheek and Doty's breach of contract claims, the court will retain those aspects of the City's motions for summary judgment under advisement pending supplemental briefing by the parties.[1]

Also before the court is plaintiffs' motion to consolidate cases for trial (doc. #103 in Case No. 06-2210). The magistrate judge previously consolidated the three lawsuits brought by plaintiffs Cheek, Doty, and Harbour for pretrial purposes. In their current motion to consolidate, they ask the court to continue that consolidation for trial. In light of the nature of the court's ruling on plaintiffs Cheek and Doty's claims, the court will grant this motion in part and deny it in part. The court will consolidate plaintiffs Cheek and Doty's lawsuits for trial, but will not consolidate plaintiff Harbour's case for trial.

STATEMENT OF MATERIAL FACTS[2]

Before plaintiffs Cheek and Doty's employment with the City of Edwardsville was terminated, they

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[1] The court will issue a separate Memorandum and Order addressing the motion for summary judgment and partial summary judgment in plaintiff Harbour's case. The court is issuing this order as to plaintiffs Cheek and Doty's claims in order to expedite the time frame for their supplemental briefing.

[2] Consistent with the well established standard for evaluating a motion for summary judgment, the following facts are either uncontroverted or stated in the light most favorable to plaintiff, the nonmoving party.

both worked as police officers for the Edwardsville Police Department. Plaintiff Cheek had been employed by the police department since October 2002. Plaintiff Doty had been employed as a police officer for approximately eleven years, and had served as a detective since 1997. In 2004, both were promoted to the then-newly created positions of Major.

At all relevant times, defendant Doug Spangler was the City Administrator. Defendants John Broman, Jennifer Burnett, and Tim Kelly were members of the City Council. Defendant Lloyd Beth was appointed the Interim Chief of Police on or around May 8, 2006; he is named as a defendant in plaintiffs Doty and Harbour's cases, but not in plaintiff Cheek's case. Other pertinent individuals from the City who are not named as defendants in these consolidated cases include Stephanie Eickhoff, who was the Mayor of the City at all relevant times; Patrick Isenhour and Robert Lane, who also were members of the City Council; and Steven Vaughan, who was the Chief of Police prior to defendant Beth's appointment as Interim Chief of Police.

Plaintiffs' First Amendment retaliation claim is based on their involvement in an investigation commenced by the Kansas Attorney General's (AG's) office in early 2006 arising from allegations of potentially illegal and improper conduct by Edwardsville employees and officials. On May 8, 2006, the City terminated plaintiff Cheek's employment by a vote by the City Council. Council members Broman, Burnett, and Kelly voted in favor of his termination.

On September 25, 2006, the City Council voted to terminate plaintiff Doty's employment. Council members Broman, Burnett, Kelly, and non-defendant Isenhour voted in favor of his termination.

I. Plaintiffs Cheek and Doty's Job Duties

Plaintiff Doty testified in his deposition that, as a detective, his job duties included investigating cases as well as conducting internal affairs (IA) investigations. He would sometimes seek assistance from outside law enforcement agencies if the City did not have the resources necessary to complete an investigation. For example, he would ask the Kansas Bureau of Investigation (KBI) to conduct polygraph examinations because the City did not have a trained polygrapher. He also recalled two occasions when he asked the Federal Bureau of Investigation (FBI) to assist with two large narcotics investigations.

On or about March 5, 2004, Chief Vaughan sent a memorandum to Mr. Spangler concerning the creation of two positions for Majors in the police department. Attached to the memorandum was a document captioned "Essential Functions of the Majors," which stated in part as follows:

- Reviews personnel related issues and makes recommendation to the Police Chief on actions taken; ensures that departmental and Personnel Policies and Procedures are appropriately carried out; participates in the

recruitment and selection process of new officers and promotions.

- Keeps abreast of legal issues, laws, interpretations and developments in the field of law enforcement; develops policies and procedures to ensure that all police activities are conducted in a proper and legal manner.

. . . .

- Assumes full responsibility for the operation of the department in the absence of the police chief.

On April 14, 2004, Officers Cheek and Doty were promoted to the rank of Major. As Majors, their job duties also included investigating possible criminal conduct, making arrests, and conducting internal affairs (IA) investigations. Additionally, they could perform the functions of the Chief of Police in Chief Vaughan's absence. Even more specifically, plaintiff Doty testified in his deposition that his job duties as a Major included supervising the police department's two detectives, investigating cases himself, and conducting IA investigations. Plaintiff Cheek testified in his deposition that his job duties as the Major in charge of operations with the police department were to oversee all of the uniformed officers, to make sure there was accountability, "to go over" and "revamp" the department policies, to start having regular staff meetings, to train and mentor the sergeants, and to reestablish a strong chain of command. He still investigated criminal conduct (from the public) and

made arrests from time to time. Additionally, he also conducted IA investigations of other police officers.

The Standard Operating Procedures of the Edwardsville Police Department state as follows with respect to the handling of IA investigations:

> Complaints alleging improper police conduct, brutality, or misconduct involving several personnel or supervisory personnel, will be handled as an internal affairs matter, and shall be investigated at the direction of the Chief of Police.
>
> a. An internal affairs authority may be appointed at the direction of the Chief of Police. If there is probable cause to believe an employee has committed a criminal offense, the District Attorney's Office will be notified and an outside agency will be requested to assist and complete an investigation for the proper jurisdiction. The internal affairs authority will continue and complete the internal investigation.

Plaintiff Doty testified in his deposition that he needed to get the approval from the Chief of Police before conducting an internal affairs investigation of a complaint made against a City police officer.

While plaintiffs Cheek and Doty were Majors with the police department, they went to the Federal Bureau of Investigation and requested that the FBI conduct an investigation into allegations of illegal conduct by Edwardsville police officer Sheila Rogoza that were outside the realm of IA, but more in the realm of criminal public corruption. Officers Cheek

and Doty provided information to the FBI regarding the alleged illegal activities of Officer Rogoza, and cooperated with and assisted the FBI in relation to the investigation. Officer Doty testified in his deposition that he believed it was within the scope of his duties as a major with the Edwardsville police department to seek the FBI's assistance in an ongoing investigation of a subordinate officer when that investigation required resources beyond those available within the department. In the Rogoza matter, he obtained the approval of Chief Vaughan before enlisting the FBI's help. Depending on the nature of the case, the Chief of Police would determine whether to seek assistance from another police agency.

Majors Cheek and Doty also conducted an internal affairs investigation regarding Sergeant James Marble for allegedly interfering in the investigation involving Officer Rogoza. Police Chief Vaughan informed Major Doty that an outside police agency, the Leawood Police Department, would participate in the IA investigation of Sergeant Marble. Mr. Spangler told Major Cheek that the City Council had requested that an outside police agency conduct the investigation. Officer Marble resigned from the police department when the IA investigation confirmed his actions in compromising an ongoing investigation.

II. Potentially Illegal or Improper Conduct by City Employees and Officials

In late 2005 or early 2006, Major Cheek was present when Melynda Harbour, another employee of the police department, discovered a DUI case file in Chief Vaughan's desk. The DUI file had been missing for some time, and had previously been reported as missing. Plaintiff Cheek testified in his deposition that the case file with the original tickets had all the "writings of impropriety on it," and he believed that something improper was going on. He testified as follows with respect to an investigation of Chief Vaughan:

> Q. (By Mr. Denning) So you would agree with me that it would have been unacceptable or inappropriate for you to conduct an investigation of Chief Vaughan?
>
> A. No. I said it would be unacceptable for us to complete the whole investigation. . . . It would be less than proper for us to, on just something hearsay, to go to the Attorney General's office and say, hey, we hear these rumors. . . . If there was enough indication that would come to me to say, hey, your superiors are doing something wrong, while it's a terribly uncomfortable situation, I would have to determine whether there is enough for an investigation to be warranted through some type of initial fact-finding myself to even know if it's worthwhile.
>
> At that point, then I would ask somebody from the outside to do what we don't do, which is public corruption, which is either FBI, KBI or

> Attorney General, and in this case, Doug Spangler used to brag about knowing people in the KBI. Really wasn't a great option just to go to the KBI and say, hey, one of your friends might be up to something. . . .

Officer Cheek believed that the AG's Office would be the appropriate agency for investigating possible corruption involving Chief Vaughan and the DUI case file.

Mr. Doty testified in his deposition as follows:

> Q. [of Mr. Doty]. And so as part of your duties as a police officer that worked for the Edwardsville Police Department for over 10 and a half years if you knew of official misconduct by a superior officer with the Edwardsville Police Department, you would take that information to whatever the appropriate authority might be; correct?
>
> A. I'd report that information, yes.

Mr. Doty further testified as follows:

> Q. When you find or when the DUI case file is found and the citation is found in Chief Vaughan's desk, part of your official duties as major with the police department of Edwardsville since it involves your superior officer [is] to go to an outside law enforcement agency that can investigate that possible criminal conduct; correct?
>
> A. Yes.

Q. And that is what you guys did; correct?

A. Yes.

In early January of 2006, Sergeant Hammontree wrote a speeding ticket to Councilman Kelly's brother. That same day, Councilman Kelly mentioned the ticket to Sergeant Hammontree. Sergeant Hammontree later checked on the status of the ticket and he could find no record of it with the Edwardsville Municipal Court. Sergeant Hammontree discussed the circumstances surrounding the ticket with Major Cheek. The two also discussed the apparent failure to process DUI tickets. Councilman Kelly spoke to Chief Vaughan about his brother's traffic ticket on two occasions. The first time, he asked Chief Vaughan how to reduce the speeding ticket to a non-moving violation. In the second conversation, Chief Vaughan told Councilman Kelly that the ticket had been taken care of or fixed. Councilman Kelly told Chief Vaughan that was not what he wanted.

In a meeting with Majors Cheek and Doty, among others, Chief Vaughan discussed another incident – Councilman Kelly's effort to influence a cocaine arrest. Chief Vaughan prepared a memorandum to Mr. Spangler documenting Councilman Kelly's communication with him regarding the cocaine arrest.

Majors Cheek and Doty discussed these various incidents with Sergeant Hammontree, who was also the Vice President of the Edwardsville police union, the Fraternal Order of Police (FOP). They discussed Councilman Kelly's communications with

Chief Vaughan about the cocaine arrest. Also, Major Cheek showed Sergeant Hammontree a copy of Chief Vaughan's memorandum regarding the cocaine arrest. Major Cheek also provided information to Sergeant Hammontree that was later incorporated into letters from the FOP to Mayor Eickhoff and the city council members. Major Cheek and Sergeant Hammontree discussed what outside law enforcement agency would investigate the problems in Edwardsville, including the disappearance of traffic and DUI citations, interference with internal affairs investigations, and interference with arrests. They discounted the Wyandotte County District Attorney's office because of possible political influence. Mr. Spangler was a former state legislator from Wyandotte County and had boasted of his connections in the District Attorney's office. They discounted the FBI and other federal agencies because they were not sure any federal crimes would be involved. They decided the FOP should go to the Kansas AG's office if it became necessary.

The FOP sent a letter dated January 20, 2006, to Mayor Eickhoff, Mr. Spangler, and the City Council, regarding allegations of potentially illegal or improper conduct by city officials and/or employees. The Edwardsville FOP sent a letter dated February 11, 2006, to the AG requesting an investigation into allegations of potentially illegal or improper conduct by Edwardsville employees and officials. John Henre and Terry Hammontree, both officers with the Edwardsville Police Department, were President and

Vice President of the FOP, respectively, when the FOP requested the Kansas AG's investigation in February of 2006. They went to Topeka, Kansas, on February 13, 2006, and requested that the AG's office investigate the allegations of potentially illegal or improper conduct by city officials and/or employees.

In February of 2006, the AG's Office began conducting an investigation into allegations of potentially illegal and improper conduct by Edwardsville employees and officials. Plaintiff Doty testified in his deposition that any police officer had a duty to cooperate with the AG's office in an investigation by that state agency.

Major Cheek met with a representative from the AG's office, Tom Williams, in late February or early March of 2006 at the Edwardsville police department. This meeting was not very long. Plaintiff Cheek met with representatives of the AG's office about "a half dozen times, or somewhere around there" prior to giving inquisition testimony in June of 2006. He provided information to the AG's office about Councilman Lane having work done on his house for free and also about Councilman Kelly asking Chief Vaughan to influence a cocaine charge, and he told the AG's investigators that he had been informed that Councilman Kelly had Chief Vaughan dispose of a speeding ticket issued to his brother. He also communicated with representatives of the AG's office by telephone. He provided information to the AG's office (prior to his termination) about the missing DUI case.

In March of 2006, Major Doty provided information to the Attorney General's investigators to the effect that Councilman Kelly had contacted Chief Vaughan in an effort to influence the handling of an arrest of a friend of his on charges of possession of cocaine. He also provided information to the AG's investigators to the effect that Councilman Lane had remodeling done on his basement for free as a result of his position with the City. Plaintiff Doty met with representatives from the AG's office at least five times. He told the representatives that Chief Vaughan and Mr. Spangler said that the City Council had ordered a halt to the IA investigations of Officers Rogoza and Marble, that he had been told that Councilman Lane had remodeling done on the basement of his home for free through a company contracting with the City, and that Chief Vaughan had prepared a memorandum stating that Councilman Kelly had attempted to influence the handling of a cocaine arrest.

In a special City Council meeting in February of 2006, Mayor Eickhoff recalled a discussion about the fact that Majors Cheek and Doty had provided information to the AG's office. Councilmen Lane and Kelly focused on Majors Cheek and Doty. In an executive session of the City Council, Mr. Spangler told the council members that Major Cheek was encouraging the FOP and "he needs to go." Councilman Isenhour understood Mr. Spangler's statement to mean that he wanted Major Cheek fired as soon as possible.

On April 3, 2006, Mr. Spangler issued a memorandum suspending Major Cheek. On May 8, 2006, plaintiff Cheek had a grievance hearing before the City Council, and he was terminated at the City Council meeting that same day. At that hearing, plaintiff Cheek, through his legal representative, told the Council that he was being terminated in retaliation for his participation in the AG's investigation. Council members Broman, Burnett, and Kelly voted to terminate Major Cheek's employment. The reasons they gave for supporting his termination included an allegedly racial comment that he made to a horse thief suspect on February 27, 2006, a civil lawsuit filed against him in Wyandotte County District Court, a heated conversation between Mr. Spangler and him, and changes that were made to his and Mr. Doty's employment contracts. Additionally, Councilwoman Burnett believed that plaintiff Cheek had a violent nature, and Councilman Kelly did not feel safe in the presence of plaintiff Cheek.

On July 28, 2006, the AG's office filed criminal charges against Chief Vaughan and Councilman Lane in relation to their alleged hindering of the DUI prosecution.

On September 25, 2006, the City Council voted to terminate plaintiff Doty. The reasons given for his termination were his alleged failure to follow orders including returning keys for his patrol car, patrolling certain areas of Edwardsville, and certain identified citizen complaints.

II [sic]. **Facts Relating to Breach of Contract Claim**

Plaintiffs Cheek and Doty were promoted to the position of Major on April 14, 2004. Prior to their promotions, their employment had been covered by a memorandum of understanding with the FOP. Once they were promoted to the rank of Major, their employment was no longer governed by that memorandum and, consequently, at that point neither of them had a written employment contract with the City. On March 28, 2005, the City Council voted on and approved employment contracts for them. The minutes of the City Council meeting show that the council approved the employment agreements attached to the minutes "with revisions." At the meeting, the City Council directed that the contracts for Majors Cheek and Doty "shadow" Chief Vaughan's contract.

Mayor Eickhoff signed the contracts, in revised form, on June 23, 2005. These contracts differed in essentially two material respects from the form contracts which were originally approved by the City Council. Those two provisions at issue state as follows:

> 7. **TERM OF EMPLOYMENT.** Subject to the city council's right of removal, which is absolute, Employee will be employed in the capacity of Major permanently until such time that the Employee is promoted or the City exercises their [sic] right to cause the Employee's removal[,] or the Employee voluntarily separates from their [sic] employment. If the

City causes the Employee's removal, the Employee will be entitled to severance pay in accordance with the terms of this agreement. . . .

. . . .

10. SEVERANCE. If the City terminates or abolishes the Employees [sic] position with or without cause, . . . Employee will be entitled to a severance package of an additional two years of their [sic] current annual salary and accrued benefits that the employee would otherwise have earned had they [sic] been actively employed.

For purposes of this agreement, "termination for cause" will mean a termination for any of the reasons referred to in the City's personnel policies as justifying termination "for cause". [sic] Whether a termination [is] "for cause" will be determined initially by the city administrator, who will give written notice of that determination to the Employee. The city administrator's determination will be subject to the City's grievance procedures then in effect for all employees. The amount of the severance will be a cash payment and the Employee may elect to receive the severance in three equal installments.

Additionally, the summary judgment record reflects that those contracts contained an additional provision entitled "TERMINATION," which stated as follows: "Nothing in this agreement may be read to prevent,

limit or interfere with the City's absolute right to terminate or remove the employee at any time."

Plaintiffs Cheek and Doty assert breach of contract claims based on the City's refusal to pay them severance pay. They contend that they are entitled to severance benefits because the City Council terminated them involuntarily.

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate if the moving party demonstrates that there is "no genuine issue as to any material fact" and that it is "entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In applying this standard, the court views the evidence and all reasonable inferences therefrom in the light most favorable to the nonmoving party. *Spaulding v. United Transp. Union,* 279 F.3d 901, 904 (10th Cir. 2002). A fact is "material" if, under the applicable substantive law, it is "essential to the proper disposition of the claim." *Wright ex rel. Trust Co. v. Abbott Labs., Inc.,* 259 F.3d 1226, 1231-32 (10th Cir. 2001) (citing *Adler v. Wal-Mart Stores, Inc.,* 144 F.3d 664, 670 (10th Cir. 1998)). An issue of fact is "genuine" if "there is sufficient evidence on each side so that a rational trier of fact could resolve the issue either way." *Adler,* 144 F.3d at 670 (citing *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986)).

The moving party bears the initial burden of demonstrating an absence of a genuine issue of material fact and entitlement to judgment as a

matter of law. *Spaulding,* 279 F.3d at 904 (citing *Celotex Corp. v. Catrett,* 477 U.S. 317, 322-23 (1986)). In attempting to meet that standard, a movant that does not bear the ultimate burden of persuasion at trial need not negate the other party's claim; rather, the movant need simply point out to the court a lack of evidence for the other party on an essential element of that party's claim. *Adams v. Am. Guar. & Liab. Ins. Co.,* 233 F.3d 1242, 1246 (10th Cir. 2000) (citing *Adler,* 144 F.3d at 671).

Once the movant has met this initial burden, the burden shifts to the nonmoving party to "set forth specific facts showing that there is a genuine issue for trial." *Spaulding,* 279 F.3d at 904 (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587 (1986)); *see also Anderson,* 477 U.S. at 256; *Celotex,* 477 U.S. at 324. The nonmoving party may not simply rest upon its pleadings to satisfy its burden. *Anderson,* 477 U.S. at 256; *Eck v. Parke, Davis & Co.,* 256 F.3d 1013, 1017 (10th Cir. 2001). Rather, the nonmoving party must "set forth specific facts that would be admissible in evidence in the event of trial from which a rational trier of fact could find for the nonmovant." *Mitchell v. City of Moore,* 218 F.3d 1190, 1197-98 (10th Cir. 2000) (quoting *Adler,* 144 F.3d at 671). To accomplish this, the facts "must be identified by reference to an affidavit, a deposition transcript, or a specific exhibit incorporated therein." *Adams,* 233 F.3d at 1246.

Finally, the court notes that summary judgment is not a "disfavored procedural shortcut"; rather, it is

an important procedure "designed 'to secure the just, speedy and inexpensive determination of every action.'" *Celotex,* 477 U.S. at 327 (quoting Fed. R. Civ. P. 1).

ANALYSIS

For the reasons explained below, the court finds that plaintiffs Cheek and Doty have not met their summary judgment burden of providing evidence that their speech was made in their capacity as citizens rather than pursuant to their official employment duties as law enforcement officers and Majors with the Edwardsville police departments. Consequently, they cannot withstand summary judgment on their § 1983 First Amendment retaliation claim. As to plaintiffs Cheek and Doty's breach of contract claims, the court rejects the specific arguments put forth by the City that Mayor Eickhoff did not have authority to enter into the employment contracts, but the parties have not addressed the potential ramifications of the controlling statutory provision as to its impact on her authority to bind the City to the severance provisions at issue. Consequently, the court will retain those aspects of defendants' motions under advisement pending supplemental briefing by the parties.

I. § 1983 Claim for Violation of First Amendment Rights

[1] The Supreme Court's landmark decision in *Garcetti v. Ceballos,* 126 S. Ct. 1951 (2006), "profoundly alters how courts view First Amendment retaliation claims." *Casey v. West Las Vegas Indep. Sch. Dist.,* 473 F.3d 1323, 1325 (10th Cir. 2007). After *Garcetti,* the court's analysis of freedom of speech retaliation claims is governed by a five-step inquiry referred to as the *Garcetti/Pickering* analysis. *Brammer-Hoelter v. Twin Peaks Charter Acad.,* ___ F.3d ___, 2007 WL 2007546, at *5 (10th Cir. July 12, 2007) (publication forthcoming). First, the court must determine whether the plaintiff was speaking "as a citizen" or "pursuant to [his or her] official duties." *Id.* (quoting *Garcetti,* 126 S. Ct. at 1960). "If the employee speaks pursuant to his or her official duties, then there is no constitutional protection because the restriction on speech 'simply reflects the exercise of employer control over what the employer itself has commissioned or created.'" *Id.* (same). Second, if the employee does not speak pursuant to his or her official duties, but instead speaks as a citizen, the court must determine whether the subject of the speech is a matter of public concern. *Id.* If the speech is not a matter of public concern, then the speech is unprotected and the inquiry ends. *Id.* Third, if the employee speaks as a citizen on a matter of public concern, the court must determine "whether the employee's interest in commenting on the issue outweighs the interest of the state as employer." *Id.*

(quotation omitted). Fourth, if the employee's interest outweighs that of the employer, the employee must show that his or her speech was a "substantial factor or a motivating factor in [a] detrimental employment decision." *Id.* (quotation omitted). Finally, if the employee establishes that his or her speech was such a factor, "the employer may demonstrate that it would have taken the same action against the employee even in the absence of the protected speech." *Id.* (quotation omitted). The first three steps are to be resolved by the district court, while the last two are ordinarily for the trier of fact. *Id.*

Defendants contend that they are entitled to summary judgment based on the first stage of this analysis – that is, that the alleged speech was part of plaintiff Cheek and Doty's official duties as police officers and Majors with the Edwardsville police department. In *Garcetti,* the Supreme Court declined to articulate a comprehensive framework for determining when a government employee speaks pursuant to his or her official duties. 126 S. Ct. at 1961. The Tenth Circuit, however, has provided significant guidance on this issue since *Garcetti.* Speech relating to tasks within an employee's uncontested employment responsibilities is not protected from regulation. *Brammer-Hoelter,* 2007 WL 2007546, at *6. This may be true even though the speech concerns an unusual aspect of an employee's job that is not part of his everyday functions. *Id.* Thus, speech is made pursuant to official duties if it is generally consistent with "the type of activities [the employee] was paid to do."

Id. (quotation omitted). An employee's official job description is not dispositive. *Id.* at *6. "The ultimate question is whether the employee speaks as a citizen or instead as a government employee – an individual acting 'in his or her professional capacity.'" *Id.* (quoting *Garcetti,* 126 S. Ct. at 1960). Consequently, if an employee engaged in speech during the course of performing an official duty and the speech reasonably contributes to or facilitates the employee's performance of the official duty, the speech is made pursuant to the employee's official duties. *Id.* At the same time, not all speech that occurs at work is made pursuant to an employee's official duties. *Id.* Nor is all speech about the subject matter of an employee's work necessarily made pursuant to the employee's official duties. *Id.* Instead, the court "must take a practical view of all the facts and circumstances surrounding the speech and the employment relationship." *Id.* On a motion for summary judgment where the defendant has asserted the defense of qualified immunity (as is the case here), the plaintiff bears the burden of providing evidence that his or her statements were made in his or her capacity as a citizen, and not as part of his or her official duties. *Casey,* 473 F.3d at 1328.

In this case, plaintiffs have not met their burden of providing evidence that their statements were made in their capacity as citizens rather than as part of their official job duties. The court must take a practical view of the employment relationship and focus on the duties plaintiffs Cheek and Doty were

expected to perform. *Garcetti,* 126 S. Ct. at 1962. As law enforcement officers and Majors with the police department, it is undisputed that they were responsible for investigating criminal conduct and conducting IA investigations. Thus, regardless of whether they were reporting alleged misconduct by fellow law enforcement officers such as Chief Vaughan (in which case their speech would have involved an internal affairs matter) or the misconduct of other City employees and officers (in which case it would have involved a criminal matter), in either event their speech owed its existence to activities that the City paid plaintiffs Cheek and Doty to do. This included their communications with Sergeant Hammontree. Even though Sergeant Hammontree was a representative of the FOP, he was also a fellow law enforcement officer. And, the summary judgment record reflects that their discussions with Sergeant Hammontree were geared toward determining how best to handle the alleged improprieties from a professional standpoint. Their numerous instances of speech with the AG's investigators were also attributable to their professional duties, as plaintiff Doty specifically testified that they had a duty to cooperate with the AG's investigation. The court cannot envision any view of the facts in which these instances of speech would not be considered to have reasonably contributed to or facilitated their performance of their duties to investigate criminal conduct and conduct IA investigations. Even though their speech involved an unusual predicament that was not part of their everyday functions, it was "generally consistent with the type of

activities [they] were paid to do." *Brammer-Hoelter,* 2007 WL 2007546, at *5 (quotation omitted) (noting that speech within an employee's uncontested employment responsibilities is not protected even though it might concern an unusual aspect of an employee's job that is not part of his or her everyday functions).

The court rejects plaintiffs' argument that their speech should be entitled to protection solely because it was made to an outside agency. In support of this argument, they rely on case law including *Lindsey v. City of Orrick,* ___ F.3d ___, 2007 WL 1814943, at *3 (8th Cir. 2007) (publication forthcoming) (statements made by municipal public works officer to city council concerning violations of sunshine law compliance were made as a citizen), and *Freitag v. Ayers,* 468 F.3d 528, 545 (9th Cir. 2006), *cert. denied,* 127 S. Ct. 1918 (2007) (female correction officer's speech to state senator and to inspector general's office regarding unremedied sexual harassment was made as a citizen). The court finds no support in those cases, however, for any such per se rule that statements made to outside agencies necessarily constitute statements made as citizens rather than pursuant to official employment duties. Instead, the courts' holdings in those cases are attributable to the scope of the plaintiffs' job responsibilities in those cases. In contrast, in this case the summary judgment record establishes that the Edwardsville police department routinely sought assistance from outside agencies in appropriate

circumstances. The department had the FBI conduct an investigation concerning Officer Rogoza, and plaintiffs Cheek and Doty provided information to, cooperated with, and assisted the FBI in connection with that investigation. The department also enlisted the assistance of the Leawood Police Department in connection with the IA investigation of Sergeant Marble. The deposition testimony of both plaintiffs Cheek and Doty establishes that the matter concerning Chief Vaughan's retention of the DUI case file was a matter to be dealt with by an outside agency. The determination of which agency to refer the various matters, and how to accomplish that referral, was an exercise of their professional judgment. Additionally, their subsequent discussions with the AG's investigators fell within the scope of their employment duties, as established by plaintiff Doty's testimony that any police officer had a duty to cooperate with the AG's office in an investigation by that agency. Thus, this is simply not a case where they can be deemed to have spoken as citizens, rather than pursuant to their official duties, simply because their speech was made to outside agencies.

Plaintiffs also rely on the Edwardsville Police Department's Standard Operating Procedures concerning the handling of IA matters. Those procedures vest authority for such internal affairs matters in the Chief of Police and require that the Wyandotte County District Attorney's Office be notified to complete the investigation. In *Garcetti,* however, the Supreme Court specifically rejected any isolated

reliance on those types of formal documents in determining the scope of an employee's job duties. The Court noted that "[f]ormal job descriptions often bear little resemblance to the duties an employee actually is expected to perform, and the listing of a given task in an employee's written job description is neither necessary nor sufficient to demonstrate that conducting the task is within the scope of the employee's professional duties for First Amendment purposes." 126 S. Ct. at 1961-62. So, too, an employee cannot rely on formal standardized policies and procedures which may bear little resemblance to the actual workings of the workplace. That is particularly so where, as here, the policy relied upon by the plaintiff employee does not really address the situation with which the employee was confronted. In this case, plaintiffs Cheek and Doty were confronted with a situation of alleged misconduct by their superiors, Chief Vaughan in particular, where it would have made little sense to follow the procedure requiring him to direct the IA investigation. Similarly, they were reporting alleged misconduct of another superior, City Administrator Spangler, for whom they perceived that it would have been futile to report his alleged misconduct to the DA's office given his purported connections. Consequently, this operating procedure cannot plausibly be deemed to divest them of the responsibility to report such misconduct.

In sum, the court finds as a matter of law that plaintiff Cheek and Doty's speech was made pursuant to their official duties rather than as citizens, and

therefore that speech is not entitled to protection under *Garcetti*. *See Morales v. Jones*, ___ F.3d ___, 2007 WL 2033754, at *5-*6 (7th Cir. 2007) (publication forthcoming) (one officer's speech to another officer regarding alleged misconduct by police chief and deputy chief was made pursuant to the speaking officer's official duties and thus was unprotected under *Garcetti*; another officer's speech to assistant district attorney about the same alleged misconduct by the police chief and deputy chief was also made pursuant to that officer's official duties); *Sigsworth v. City of Aurora*, 487 F.3d 506, 511 (7th Cir. 2007) (police detective's report to his supervisors that he believed members of his task force broke the law by tipping off suspects regarding arrest warrants and jeopardized the success of the operation was speech made pursuant to official duties); *Williams v. Riley*, 481 F. Supp. 2d 582, 584 (N.D. Miss. 2007) (county police officers did not speak as citizens when they submitted a written report which detailed the beating of a restrained prisoner by a fellow officer). Accordingly, defendants' motions for summary judgment on plaintiffs Cheek and Doty's § 1983 First Amendment retaliation claim is granted.

II. Breach of Contract Claim

The City contends that it is entitled to summary judgment on plaintiffs Cheek and Doty's breach of contract claims on the grounds that their contracts are unenforceable. The City's reasoning in this respect is that plaintiffs Cheek and Doty's claims are

not based on the form contracts approved by the Edwardsville City Council on March 28, 2005, but rather are impermissibly premised on revised versions of the contracts which were executed by Mayor Eickhoff on June 23, 2005. The City contends that the revised contracts contained different terms (their severance provisions, in particular) than the contracts voted on and approved by the City Council, and that Mayor Eickhoff lacked the authority to agree to those terms.

"Generally, a contract entered into by a governmental agent is binding on the governmental entity." *Templeton v. Kan. Parole Bd.,* 27 Kan. App. 2d 471, 473, 6 P.3d 910, 913 (2000). A municipal corporation cannot bind itself by any contract which is beyond the scope of its powers. *Weil & Assocs. v. Urban Renewal Agency,* 206 Kan. 405, 416, 479 P.2d 875, 885 (1971). Persons contracting with a municipal corporation are obligated to inquire into the agency's power and be aware of the limits of its powers. *Blevins v. Bd. of Douglas County Comm'rs,* 251 Kan. 374, 384, 834 P.2d 1344, 1352 (1992). Thus, the binding nature of governmental contracts is limited by the agency's statutory authority. *Templeton,* 27 Kan. App. 2d at 473, 6 P.3d at 913. An attempt by a governmental agency to enter into a contract in violation of its authority will be considered void. *Wiggins v. Housing Auth.*, 22 Kan. App. 2d 367, 370, 916 P.2d 718, 721 (1996). If a municipal corporation enters into a contract it has no power to make, the contract is ultra vires and unenforceable. *Id.* "[A]ny reasonable doubt

as to the existence of a particular power must be resolved against its existence." *Id.* (citing *Wichita Pub. Sch. Employees Union v. Smith,* 194 Kan. 2, 4, 397 P.2d 357, 359 (1964)).

The City pursues its theory that the Mayor lacked authority to bind the City to the revised contracts from essentially three different angles. First, the City argues that there was no "meeting of the minds" as to the employment contracts because the versions that were finally signed on June 23, 2005, contained terms that were significantly and materially different from the terms voted on and approved by the City Council. It is true that in order for parties to form a binding contract, there must be a "meeting of the minds" as to all of its essential terms. *Dougan v. Rossville Drainage Dist.,* 270 Kan. 468, 488, 15 P.3d 338, 352 (2000). The City's argument premised on the asserted lack of a "meeting of the minds," however, assumes that the mayor was without authority to manifest assent to the contract on behalf of the City. Thus, the City's "meeting of the minds" argument is really a roundabout way of saying that Mayor Eickhoff did not have authority to bind the City to the contract.

Consequently, the court proceeds to the City's second argument, in which the City contends that the mayor lacks express statutory authority to enter into employment contracts that are not approved by the City Council. Certainly, the City has the statutory power to enter into contracts. K.S.A. § 12-101. And, the governing body includes the mayor and the city

council. *Id.* § 12-104. It is undisputed that Edwardsville is a city of the third class. As such, the general powers and duties of the mayor are set forth in K.S.A. § 15-301, which states that the mayor has "general supervision over the affairs of the city." Additionally, the Edwardsville local ordinances give the mayor "superintending control of all officers and affairs of the city." Edwardsville Local Ordinance § 1-205. The City contends that the lack of express statutory authority for the mayor to enter into an employment contract suggests that Mayor Eickhoff lacked the authority to do so in the absence of approval from the City Council. The court disagrees because the cited statute and ordinance give the mayor general supervision and superintending control over the officers and affairs of the City. The power to enter into contracts, such as the employment contracts at issue here, unless that power is limited by statute or otherwise, is necessary to make those express powers effective. *See Jordan v. City of Overland Park,* 215 Kan. 700, 709, 527 P.2d 1340, 1348 (1974) (cities have the powers expressly granted by law and those necessary to make those powers effective); *cf. Piper v. City of Wichita,* 174 Kan. 590, 597, 258 P.2d 253, 598 (1953) (statute making city manager, in city manager form of government, responsible for administration of the city's affairs included responsibility for personnel matters).

In an attempt to determine the relative power to contract as between the City Council vis a vis the Mayor, the City points out that in cities of the third

class, the appointment of law enforcement officers is governed by K.S.A. § 15-204. That statute governs the appointment of city officers in general, including law enforcement officers, and it states that the mayor is vested with authority to "appoint" officers "with the consent of the council." K.S.A. § 15-204. The City contends that this statute suggests that any employment contract entered into on behalf of the City must be approved by the City Council. Although the court agrees that this statute is of critical importance in determining the enforceability of the particular provision on which plaintiffs' claims depend, the court disagrees with this specific argument by the City. The portion of the statute which requires the City Council's consent addresses only the power to "appoint" city officers. To "appoint" means to "designate, choose, select, assign, ordain, prescribe, constitute, or nominate." Black's Law Dictionary 99 (6th ed. 1990); *see also* Black's Law Dictionary 109 (8th ed. 2004) (appointment means "[t]he designation of a person, such as a nonelected public official, for a job or duty"). The language of the statute, then, gives the city council the power to consent to the mayor's designation or selection of particular city officers, but nothing more. The City does not argue that the City Council did not consent to designating plaintiffs Cheek and Doty as Majors in the police department, and the statute did not require the City Council to consent to the subsequent employment contracts.

The final argument advanced by the City in support of its theory that the employment contracts

are unenforceable is that the provisions purporting to employ plaintiffs Cheek and Doty as Majors "permanently" and providing that plaintiffs are entitled to a two-year severance package impermissibly attempt to limit the City Council's statutory rights and are in direct conflict with § 15-204. The court turns first to the so-called "permanent" term of employment. This term does not have the meaning ascribed to it by defendants. Kansas courts follow the general rule that "in the absence of an express or implied contract of duration . . . , employment is terminable at the will of either party." *Burnett v. Southwestern Bell Tel., L.P.,* 283 Kan. 134, 146, 151 P.3d 837, 845 (2007) (quotation omitted). The use of the term "permanent" in an employment contract does not mean employment for a fixed or definite period of time, but rather that the job is of some permanence as distinguished from being temporary. *Johnson v. Nat'l Beef Packing Co.,* 220 Kan. 52, 54-55, 551 P.2d 779, 782 (1976); *Wiggins,* 22 Kan. App. 2d at 370-71, 916 P.2d at 721. Moreover, plaintiffs Cheek and Doty's employment contracts expressly preserved the City Council's statutory right of termination. *See* K.S.A. § 15-204 ("Any officer may be removed by a majority vote of the total membership elected or appointed to the council. . . ."). The contracts stated that the so-called "permanent" term of employment was "[s]ubject to the city council's right of removal, which is absolute." And, a separate provision stated that "[n]othing in this agreement may be read to prevent, limit or interfere with the City's absolute right to terminate or remove the employee at any

time." Consequently, the City Council's termination of plaintiffs Cheek and Doty's employment did not constitute a breach of the employment contract.

An entirely separate issue arises, however, as to whether the severance provisions are actually enforceable. Although the mayor has general supervisory and superintending authority over the City's officers, which necessarily implies the ability to enter into employment contracts, that does not mean that all provisions set forth in employment contracts are enforceable. To that end, the parties have not discussed the mayor's authority to contract for severance pay in light of a statutory provision which, in the court's view, might very well be at the heart of their dispute. K.S.A. § 15-204 not only governs the mayor's appointment of officers, it also governs those officers' "duties and compensation." It states that "[t]he duties and pay of the various officers shall be regulated by ordinance." The court believes that defendants' motions for summary judgment raise the issue of the potential impact of this statutory provision because the City argues that Mayor Eickhoff acted beyond her authority under § 15-204. But, because the City did not specifically address the "regulated by ordinance" provision in § 15-204 as a basis for its summary judgment motion, plaintiffs have not had an opportunity to address the possible ramifications of this particular statutory provision.

As such, the court will retain under advisement the City's motions for summary judgment as to plaintiffs Cheek and Doty's breach of contract claims,

and the court will direct the parties to submit supplemental summary judgment briefs limited to addressing this issue. The City may submit a supplemental brief in support of its motions for summary judgment on or before **September 5, 2007**, plaintiffs shall file a supplemental response on or before **September 14, 2007**, and the City may file a supplemental reply on or before **September 21, 2007**.

MOTION TO CONSOLIDATE CASES FOR TRIAL

The magistrate judge consolidated the lawsuits of plaintiffs Cheek and Doty as well as another lawsuit filed by Melynda Harbour for all pretrial purposes. Plaintiffs have since filed a motion to consolidate all three cases for trial. Rule 42(a) of the Federal Rules of Civil Procedure allows a court to consolidate "any or all of the matters in issue in the actions" if the actions involve "common questions or law or fact." Fed. R. Civ. P. 42(a). In view of the nature of the court's ruling on plaintiffs Cheek and Doty's First Amendment claims, the court will grant plaintiffs' motion to consolidate as to plaintiffs Cheek and Doty's cases to the extent that any claims ultimately survive for trial, but will deny the motion as to plaintiff Harbour's case. As explained herein, plaintiffs Cheek and Doty's cases continue to share common questions of law or fact relating to the severance provisions in their employment contracts. Because those cases no longer contain § 1983 First Amendment retaliation claims, however, the court finds that

continued consolidation with plaintiff Harbour's case is no longer warranted. Judicial efficiency would best be served by addressing plaintiffs Cheek and Doty's remaining breach of contract claims in a context separate and apart from plaintiff Harbour's § 1983 First Amendment retaliation and FMLA claims.

IT IS THEREFORE ORDERED BY THE COURT that defendants' motions for summary judgment (doc. #95 in Case No. 06-2210 and doc. #27 in Case No. 06-2445) are granted as to plaintiffs Cheek and Doty's § 1983 First Amendment retaliation claims. Those motions are taken under advisement, pending further briefing, as to plaintiffs' breach of contract claims. The City is directed to submit a limited supplemental brief in support of its motions for summary judgment on or before **September 5, 2007**, plaintiffs shall file a supplemental response on or before **September 14, 2007**, and the City may file a supplemental reply on or before **September 21, 2007**.[3]

IT IS FURTHER ORDERED that plaintiffs' motion to consolidate cases for trial (doc. #103 in Case No. 06-2210) is granted in part and denied in part. The lawsuits brought by plaintiffs Cheek and Doty (Case Nos. 06-2210 and 06-2445) remain consolidated for trial, but those cases are not consolidated for trial

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[3] As a result of the court's rulings in this Memorandum and Order, plaintiffs Cheek and Doty's claims which may survive are hereby set for trial on **October 30, 2007**.

with the lawsuit brought by plaintiff Harbour (Case No. 06-2459).

IT IS SO ORDERED this 24th day of August, 2007.

s/ John W. Lungstrum
John W. Lungstrum
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JEFFREY CHEEK;
ALVIN DOTY,

Plaintiffs-Appellants,

v.

CITY OF EDWARDSVILLE, KANSAS; JOHN BROMAN; JENNIFER BURNETT; TIM KELLY; DOUG SPANGLER; LLOYD BETH,

Defendants-Appellees.

No. 07-3341
(D.C. No. 2:06-CV-02210-JWL)
(D. Kan.)

ORDER

(Filed Nov. 17, 2008)

Before **TACHA**, **PORFILIO**, and **TYMKOVICH**, Circuit Judges.

Appellants' petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no

judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

/s/ Elisabeth A. Shumaker
ELISABETH A. SHUMAKER,
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Cases No. 07-3341

Jeffrey Cheek and Alvin Doty,
Plaintiff-Appellants
v.
The City of Edwardsville, Kansas;
John Broman; Jennifer Burnett; Tim Kelly;
Doug Spangler; and Lloyd Beth
Defendant-Appellees

Appeal from the United States District Court
For the District of Kansas
The Honorable John W. Lungstrum
Consolidated Case No. 06-2210-JWL-JPO

Plaintiff-Appellants' Petition for Rehearing
and Rehearing En Banc

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G. Gordon Atcheson
The Atcheson Law Office
4800 Rainbow Blvd.
Westwood, Kansas 66205
(913) 362-8650
(913) 362-8652 (fax)

Plaintiffs' Petition for Rehearing and Rehearing En Banc

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F.R.A.P. 35(b)(1) Statement

With its simplistic order and judgment in this case, the panel both abandons the judiciary's obligation to affirmatively protect free speech rights and endorses a lower court ruling effectively denying law enforcement officers any constitutional protection for communication with outside investigative agencies. The first cannot be reconciled with settled constitutional principles governing disposition of free speech cases. *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 504-05 (1984). And the second impermissibly constricts the dimensions of public employee

free speech rights as outlined by the Supreme Court in *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006), and this Court in *Casey v. West Las Vegas Independent School Dist.*, 473 F.3d 1323, 1330-34 (10th Cir. 2007).

The immediate casualties of the decision are Plaintiffs Jeffrey Cheek and Alvin Doty, veteran police officers in the town of Edwardsville, Kansas. They were fired for speaking with the Kansas Attorney General's office during the AG's investigation of municipal corruption, which resulted in criminal charges against an Edwardsville councilman and chief of police. But the ruling also deprives thousands of law enforcement officers across this Circuit of free speech protection should they communicate as witnesses with state or federal agents investigating municipal corruption, civil rights violations, or other governmental wrongdoing.

The panel order conflicts with the federal courts' duty to review the record in free speech cases to insure that the fundamental right has not been compromised. The order fails to look beyond a phony argument it erroneously imputes to Plaintiffs. *Bose Corp.*, 466 U.S. at 504-05; *Eaton v. Meneley*, 379 F.3d 949, 954 (10th Cir. 2004).

Substantively, the decision strips a broad class of public employees – law enforcement officers – of free speech rights if they communicate as cooperative witnesses with investigators from other governmental entities. The result conflicts with the analysis of

public employees' free speech rights in *Garcetti* and *Casey* and implicates an issue of exceptional importance.

Panel Dismisses Appeal Based on an Inferior Argument Plaintiffs Never Asserted

The panel accomplishes its degradation of free speech jurisprudence in two paragraphs by manufacturing an inferior argument that Plaintiffs Cheek and Doty never presented here or in the lower court and then declaring that concocted argument inadequate. The panel goes no further in analyzing the faulty summary judgment entered below and never addresses the actual arguments presented. *Order,* Sept. 10, 2008, at 5-7. Cheek and Doty sued the City and its officials under 42 U.S.C. § 1983. Although the record showed the two were terminated because of their communication with state investigators, the trial court, nonetheless, granted summary judgment on the ground their speech amount to a job duty and, thus, was unprotected under *Garcetti.* The impact on Plaintiffs is obvious, but the panel also ill served the most fundamental of First Amendment rights. *New York Times Co. v. Sullivan,* 376 U.S. 254, 270-71 (1964) (uninhibited speech a cornerstone to democracy).

A. Panel Abdicates its Responsibility to Review the Whole Record. Free speech represents the bedrock right upon which our system of government

rests. *Terminiello v. Chicago,* 337 U.S. 1, 4 (1949) ("The right to speak freely and to promote diversity of ideas and programs is therefore one of the chief distinctions that sets us apart from totalitarian regimes."). Because of its profound importance, the courts – as the ultimate guardians of the Constitution – must make a searching review of the record in cases implicating free speech to insure that the resulting judgment does not impermissibly impair that right. In a case pivoting on the constitutional protection to be afforded the speech at issue, "the [Supreme] Court has regularly conducted an independent review of the record both to be sure that the speech in question actually falls within the unprotected category and to confine the perimeters of any unprotected category within acceptably narrow limits in an effort to ensure that protected expression will not be inhibited." *Bose,* 466 U.S. at 505. The Tenth Circuit, of course, has imposed that same obligation on trial judges and its own panels. *Eaton,* 379 F.3d at 954 (citing *Lytle v. City of Haysville, Kan.,* 138 F.3d 857, 862 (10th Cir. 1998)); *Lytle,* 138 F.3d at 862 ("'[i]n cases raising First Amendment issues an appellate court has an obligation to make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression.'") (quoting *Rankin v. McPherson*, 483 U.S. 378, 386 n. 9 (1987)). In short, free speech rights should not be sacrificed to the ineptitude of counsel in failing to make sufficient

arguments for the protection of communication actually embraced by the First Amendment.

In this case, the panel abdicated that duty. Even if Plaintiffs had made the infirm argument the panel attributes to them (though they did not), the court had an obligation to independently determine if the speech at issue enjoyed constitutional protection based on the record evidence. The panel did no such thing. *Order* at 6-7 (rejecting Plaintiffs' putative argument, but conducting no additional analysis of the constitutional free speech issue). On that basis alone, the panel order should be vacated, and the case should scheduled for oral argument and full review. The panel's perfunctory disposition of the free speech claim violates Supreme Court and Circuit precedent.

B. Panel Mischaracterizes Plaintiffs' Arguments for Reversal. Moreover, the panel misrepresent Cheek and Doty as arguing that the Tenth Circuit's decision in *Casey* creates a rule "that intra-agency reporting is not protected [under the First Amendment], while a report to an outside agency is protected[.]" *Order* at 6. And the panel then dismisses that facile distinction as a constitutionally unsound argument for reversal. *Id.* at 7. Indeed, it would be.

But Cheek and Doty made no such argument. They devoted a five-page section of their appellate brief to a detailed analysis of *Casey*, in part because the trial judge in this case gave the decision such

short shrift and in part because it is perhaps the most instructive opinion from any circuit addressing *Garcetti's* job-duty standard for assessing protected speech of public employees. Aplts. Opening Brief at 39-44. In that portion of their argument, Cheek and Doty explained: "This Court held that, given Casey's designation as CEO of the district's Head Start program and the specific duties attendant to that position, her reporting to the federal government was sufficiently job related to be without First Amendment protection. *Casey*, 473 F.3d at 1330-31. The Court carefully distinguished its holding from the run of cases in which public employees speak to outside agencies and pointed to the 'rather narrower and subtler set of facts' defining Casey's job as the overseer of the Head Start program. *Id.* Indeed, the Court's analysis of Casey's communication with the New Mexico Attorney General about the open meetings violations provides an apt counterpoint illustrating the more common scenario. Cheek and Doty's communications are legally comparable to Casey's statements to the state attorney general on the open meetings violations, rather than to her report to the federal government on the Head Start irregularities." Brief at 40-41 (paragraph break omitted). Just how the panel deconstructed that analysis into some sort of argument for a per se rule affording constitutional protection to all external communication seems, at the least, baffling. For that reason, the order should be vacated, since it is premised on a plainly erroneous and distressingly careless characterization of one of

Cheek and Doty's main arguments. A full review of the issues on appeal requires reversal of the lower court's summary judgment and remand for trial.[1]

Synopsis of Facts

Cheek and Doty served as majors in the 15-person Edwardsville, Kansas, police department – second-in-command to Chief Steve Vaughan. The remaining officers below the rank of major belonged to the Fraternal Order of Police (FOP) and enjoyed protection against wrongful termination through the union contract with the City. In late 2005 and early 2006, Cheek, Doty, and other officers saw indications that Chief Vaughan and members of the elected city council may have been thwarting prosecution of drunk driving cases and other traffic violations for friends or associates. And the Chief had indicated at a lunch with Cheek, Doty, and other municipal officials that a councilman sought to influence the handling of a felony drug case. The FOP also believed that some elected officials were insinuating themselves too

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[1] Cheek and Doty have included that section of their brief as part of the appendix to this petition, along with the panel's order. Cheek and Doty, of course, discussed and applied *Casey* elsewhere in their appellate brief. They also made the same point – that *Casey* broadly assays how a public employee's speech to outside entities should be analyzed because it found some of the Plaintiff Casey's external speech protected and some not – to the trial court. See App. 364-67 (mem. op. sum. j. at 51-54).

deeply into departmental disciplinary matters and other operational decisions.

In late January, the FOP – through its vice president Sgt. Terry Hammontree – wrote and delivered a letter to the mayor and city council outlining those and other concerns. The letter invited a quick response. None was forthcoming. In early February, the FOP sent another letter and suggested that the information would be turned over to the Kansas Attorney General's office if the problems were not remedied.[2] Later in February, FOP President John Henre and Vice President Hammontree met with state investigators at the Attorney General's office in Topeka. While Cheek and Doty knew of the FOP's efforts, reviewed the letters before delivery, and offered support to the union, they did not initiate communication with the City's elected officials or the Attorney General's office.

In short order, investigators from the Attorney General's office began interviewing various Edwardsville officials and employees including Cheek and Doty and Melynda Harbour, the lone civilian working in the police department. The investigators' presence was well known, and the council members were abuzz about the probe. The city administrator confronted Harbour regarding her cooperation with the investigators. Cheek came to be viewed as a catalyst in the

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[2] The letters were on FOP stationery and bore a generic signature: Fraternal Order of Police Lodge #42. App. 298-300.

process. The city administrator suspended Cheek in April 2006, and the City Council fired him in May.

Chief Vaughan took a "medical" leave about that time. The City Council then promoted a part-time codes enforcement officer to acting chief. He cut Harbour's job from full-time to part-time and put Doty on patrol duties. The acting chief then placed Doty on successive suspensions without pay from mid-July until his termination two months later. In late July, the Attorney General's office filed criminal charges against Chief Vaughan and Edwardsville Councilman Robert Lane for conspiring to prevent the prosecution of DUI cases. The City Council fired Harbour and Doty in September without following municipal policies on notice and hearing.[3]

In a companion suit Harbour filed challenging her termination, the trial court found ample evidence to withstand summary judgment under a traditional, pre-*Garcetti* analysis of public employees' free speech rights. *Cheek v. Edwardsville,* 514 F.Supp.2d 1236, 1245-46 (D. Kan. 2007) ("[A] rational trier of fact could find based on these facts that [P]laintiff [Harbour] was terminated because of her involvement in the investigation."). The trial court also noted the evidence supported the conclusion that Cheek was

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[3] The facts are more involved, of course, but that overview fairly depicts the sequence of events and the adverse actions directed at Cheek, Doty, and Harbour, especially taken in light of the proper summary judgment standard.

viewed as a "primary participant in the AG's investigation" and "the City wanted him gone" for that reason. *Id.* at 1245. But for the erroneous application of *Garcetti* to deprive Cheek and Doty of free-speech protection, the record warrants a jury trial. (As a civilian employee performing clerical and administrative tasks, Harbour did not even arguably speak to the outside investigators as part of her job duties and, thus, faced no *Garcetti* bar.)

Free Speech After *Garcetti:* Public Employees Protected When Communicating in a Manner Shared with Private Citizens

In *Garcetti*, 547 U.S. at 421, the Supreme Court held that a public employee speaking as part of his job duties lacks constitutional protection for that communication. But the Court pointed out that a public employee does not lose constitutional protection merely because his speech may be "related to" the job. *Id.* Likewise, when the speech entails the sort of communication in which private citizens as well as public employees engage, the First Amendment shields the speaker. The Court offered as examples of protected speech a government employee's letter to the editor or discussion of politics with co-workers. *Id.*, at 423-24. Conversely, unprotected speech is that with "no relevant analogue to speech by citizens who are not government employees." *Id.* at 424. The Court, however, declined to lay down any test or standards to determine if the speech at issue in a

given case were sufficiently job-related to be unprotected.

This Court's decision in *Casey* steps into that void to outline, especially by example, when a public employee's communication with external governmental agencies warrants free speech protection. This Court recognized that typically such speech should be protected, as was School Superintendent Casey's communication to the New Mexico attorney general about the school board's violation of state open meetings statutes. Conversely, Casey had been officially designated as the chief officer of the district's Head Start program, entailing specific statutory and regulatory oversight and reporting duties to the federal government. On those unusual facts, this Court found that Casey's report of financial misfeasance in the local program to federal regulators was sufficiently job related under *Garcetti* to fall outside the First Amendment. *Casey,* 473 F.3d at 1331-32.

Employing traditional reasoning-by-analogy, Cheek and Doty argued below and on appeal that their circumstances were comparable to Casey's communication with the attorney general rather than to her communication with the federal government and, therefore, should be treated as constitutionally shielded speech. *See U.S. v. Tapia,* 309 F.3d 1283, 1288 (10th Cir. 2002) (use of analogous case law); *Pabst Brewing Co., Inc. v. Corraro,* 161 F.3d 434, 441 (7th Cir. 1998) (noting "classic common law style of reasoning by analcgy"). In this case, no job description, regulation, or statute required Cheek or Doty to

speak with the Kansas Attorney General's office about municipal corruption. They did not even initiate contact with the Attorney General – representatives of the police union did. Cheek and Doty responded to investigators' inquiries as witnesses, a role shared equally with private citizens having information about criminal activity.

Public employees enjoyed constitutional protection for such speech before *Garcetti*. *See, Stanley v. City of Dalton, Ga.*, 219 F.3d 1280, 1289-91 (11th Cir. 2000) (deputy sheriff's statements made to agents during Georgia Bureau of Investigation (GBI) of corruption within the sheriff's department constitutionally protected); *Cooper v. Smith*, 89 F.3d 761, 765 (11th Cir. 1996); *Hamer v. Brown*, 831 F.2d 1398, 1402-03 (8th Cir. 1987); *Marohnic v. Walker*, 800 F.2d 613, 616 (6th Cir. 1983). And post-*Garcetti* cases have preserved that shield, except for peculiar fact patterns illustrated by Casey's role as CEO of the school district's Head Start program. *Davis v. McKinney*, 518 F.3d 304, 314 (5th Cir. 2008) (public employee's external communications generally protected speech); *Freitag v. Ayers*, 468 F.3d 528, 545 (9th Cir. 2006) ("[Freitag's] right to complain both to an elected public official and to an independent state agency is guaranteed to any citizen in a democratic society regardless of his status as a public employee.");

Lindsey v. City of Orrick, Missouri, 491 F.3d 892, 895, 898 (8th Cir. 2007).[4]

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[4] Defendants make much of the Edwardsville police department's occasional requests to other law enforcement agencies for assistance with specialized services, such as polygraph testing, or large drug investigations. They suggest that somehow those formal requests bear some resemblance to Cheek's and Doty's willingness to answer questions from the state investigators. But, of course, those investigators were on the scene because of the actions of the police union rather than in response to an official request from the chief or other ranking officers. And the corruption investigation originated with the attorney general's office – not the Edwardsville police department. Defendants' observation fails to show that Cheek and Doty were acting within their job duties as majors rather than as witness in an external investigation.

Similarly, Defendants attempt to blur the distinction between a police officer's job duties, on the one hand, and his moral obligation or duty, on the other, to assist in an outside investigation. Doty testified at deposition that he believed he had a duty as a police officer to cooperate with the attorney general's investigators. The record is less than clear about the source of the duty he perceived – one somehow incumbent upon him as part of his job as a major in the Edwardsville police department or a moral duty. App. 528-29. The latter has nothing to do with a *Garcetti* evaluation of free-speech rights; the former reflects a factor to be considered. Cheek testified that the duty he felt to cooperate in the investigation derived from a moral obligation of citizens generally to aid law enforcement officers. App. 494-95. Neither opinion is legally dispositive. The circumstances pose a jury question on a factual determination implicated in the *Garcetti* job-duty analysis, thereby rendering summary judgment inappropriate. *Foraker v. Chaffinch*, 501 F.3d 231, 240 (3rd Cir. 2007) ("[W]hether a particular incident of speech is made within a particular plaintiff's job duties is a mixed question of fact and law."). *Cf. Weaver v. Chavez*, 458 F.3d 1096, 1101-02 (10th Cir. 2006) (The "public concern" component of the *Pickering* analysis presents a question of law for the court,

(Continued on following page)

Panel Decision Cannot Be Reconciled with *Garcetti* or *Casey*

The lower court ruling and the appellate disposition effectively deny law enforcement officers free-speech protection for any communication they might have with outside investigative agencies regardless of circumstance. But that represents an extraordinarily jumbled application of *Garcetti*, 547 U.S. at 421, since a public employee does not lose First Amendment protection simply because his speech "concern[s] the subject matter of [his] employment." The erroneous premise seems go this way: Law enforcement officers investigate crimes and interview witnesses. Therefore, if an officer is *interviewed as a witness* about a crime, that becomes job related. The logic supporting the reasoning is suspect. If Cheek and Doty were to lack constitutional protection for their speech as witnesses in an outside investigation – a reversal of their workplace role as police officers – would they also lack protection as crime victims?

After all, police officers routinely deal with victims of crimes as well as with witnesses. Suppose the police chief demanded a kickback from Cheek and Doty on the threat he would give them falsely negative job reviews. That would amount to theft or blackmail under Kansas law. K.S.A. 21-3428 (blackmail); K.S.A. 21-2701(a)(3) (theft). Would the officers

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but the jury must resolve material factual disputes about what a government employee actually said.).

lack constitutional protection for reporting the shakedown to the Attorney General?

Here, of course, Cheek and Doty did not conduct an investigation, gather evidence, or interview witnesses on their own. Nor did they advise the outside investigators about how to handle the probe or consult on charges to be brought against Edwardsville officials. In short, they did nothing resembling police work; they functioned just as a private-citizen witness would have. Contrary to the trial court's premise, acting as a cooperative witness in another agency's investigation was not part and parcel of what Cheek and Doty were paid to do. App. 1019 (Order at 20). Being a witness is hardly unique to public employment or law enforcement; rather, private citizens speak in that capacity, too – the overarching consideration for constitutional protection. *Garcetti*, 547 U.S. at 424. Accordingly, the lower court decision and this panel's order conflict with *Garcetti* and *Casey*.

Conclusion

The Court en banc has two options. It may vacate the unpublished order and require a full review by a newly constituted panel. Alternatively, it may address

the merits of the appeal on the existing briefing and, given the error below, remand for trial.[5]

Respectfully submitted,

s/G. Gordon Atcheson
The Atcheson Law Office
4800 Rainbow Blvd., Suite 6
Westwood, KS 66205
(913) 362-8650
(913) 362-8652 (fax)
gga@atchesonlaw.com

Certificate of Compliance for E-filing

Plaintiff-Appellants Jeffrey Cheek and Alvin Doty, through their counsel, hereby certify that appropriate redactions have been made in their petition and the document is otherwise an exact copy of the written document filed with the Clerk of the Court.

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[5] The Court should do likewise with Plaintiffs' claims for breach of their employment contracts. Relying on century-old dicta, the trial court incorrectly held the contracts to be unenforceable because the City Council approved salaries for Cheek, Doty, and other municipal employees by voting on a resolution rather than an ordinance. Modern Kansas law would hold municipalities to their contracts regardless of a technical lapse in form. *Blockbuster Video, Inc. v. City of Overland Park*, 24 Kan.App.2d 358, Syl. 1, 948 P.2d 148 (1997) ("[A] resolution is no less legally binding than an ordinance[.]"); *International Association of Firefighters Local 1596 v. City of Lawrence*, 14 Kan.App.2d 788, 798, 798 P.2d 960 (1990), *rev. denied* 248 Kan. 996 (1991) (municipal employment contract entered into pursuant to resolution legally binding on city).

They further certify that the document was scanned for viruses using McAfee VirusScan updated on October 8, 2008, and, according to that program, the document is virus free.

Dated: October 8, 2008

s/ G. Gordon Atcheson

CERTIFICATE OF SERVICE

I hereby certify that I served the above petition for rehearing and rehearing en banc on the parties to this action by e-mail on this 8th day of October, 2008 addressed as follows:

James D. Conkright jdc@sanconwar.com
William P. Denning w.denning@sanconwar.com
Sanders, Conkright & Warren
9401 Indian Creek Parkway
Overland Park, KS 66210

s/ G. Gordon Atcheson

APPENDIX
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JEFFREY CHEEK;
ALVIN DOTY,

Plaintiffs-Appellants,

v.

CITY OF EDWARDSVILLE, KANSAS; JOHN BROMAN; JENNIFER BURNETT; TIM KELLY; DOUG SPANGLER; LLOYD BETH,

Defendants-Appellees.

No. 07-3341
(D.C. No. 2:06-CV-02210-JWL)
(D. Kan.)

ORDER AND JUDGMENT*

(Filed Sep. 10, 2008)

Before **TACHA**, **PORFILIO**, and **TYMKOVICH**, Circuit Judges.

* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

Plaintiffs Jeffrey Cheek and Alvin Doty, former police officers with the City of Edwardsville (City), filed suit under 42 U.S.C. § 1983, alleging they were discharged because they cooperated with the Kansas Attorney General (AG) in an investigation into public corruption by City officials. They also brought state-law claims asserting that the City breached its employment contracts with them by failing to pay severance benefits. The district court entered summary judgment in favor of defendants on plaintiffs claims that they were discharged in violation of their First Amendment right to freedom of speech. *Cheek v. City of Edwardsville,* 514 F. Supp. 2d 1220 (D. Kan. 2007). In a separate order, the district court granted summary judgment to defendants on plaintiffs' breach-of-contract claims. *Cheek v. City of Edwardsville,* 514 F. Supp. 2d 1251 (D. Kan. 2007). The court later denied plaintiffs' motion to alter or amend the judgment. We exercise jurisdiction under 28 U.S.C. § 1291 and affirm.

Background

The district court provided a detailed summary of the facts and procedural history involved in this case, and we need not restate that material here. Briefly, plaintiffs were City police officers who were promoted to the newly-created position of major in 2004. As majors, their job duties included investigating criminal cases and internal affairs. Plaintiffs and other City officers regularly sought assistance from outside law-enforcement agencies, such as the Kansas

Bureau of Investigation or the Federal Bureau of Investigation. At the relevant time, defendant Spangler was the City Administrator, and defendants Broman, Burnett, and Kelly were members of the City Council. Defendant Beth was appointed Interim Police Chief to replace Police Chief Steve Vaughan while the corruption investigation was pending.

In late 2005 or early 2006, plaintiffs discovered evidence that Chief Vaughn and Councilman Kelly had improperly influenced criminal and traffic charges in order to help their friends and relatives. The standard procedure was to report these allegations to the Chief of Police, but given the fact that he was implicated, plaintiffs instead decided that the best procedure was to have a police-union representative report the allegations to the Kansas AG. In February and March of 2006, both plaintiffs provided information to the AG's office concerning the investigation. The City Council discharged plaintiff Cheek on May 8, 2006; the Kansas AG's office filed criminal charges against Chief Vaughan and Councilman Lane on July 28, 2006; and the City Council discharged plaintiff Doty on September 28, 2006.[1] Plaintiffs filed suit asserting that they were fired in retaliation for exercising their First Amendment right to free speech. Plaintiffs also brought state-law claims for breach of contract based on the City's refusal to honor

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[1] Defendants Broman, Burnett, and Kelly voted to discharge plaintiff Cheek. Plaintiff Doty does not identify the Council members who voted to discharge him.

the clause in each plaintiff's contract providing for severance pay equal to two years' salary upon discharge.

The district court granted summary judgment in defendants' favor on plaintiffs' § 1983 claims, holding "as a matter law that plaintiff Cheek and Doty's speech was made pursuant to their official duties rather than as citizens, and therefore that speech is not entitled to protection under *Garcetti* [*v. Ceballos,* 547 U.S. 410 (2006)]." *Cheek,* 514 F. Supp. 2d at 1232. *Garcetti* held that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Garcetti,* 547 U.S. at 421. In a separate memorandum and order, the court granted summary judgment to defendants on the contract claims, primarily because the severance provision was not enacted as an ordinance, as required by a Kansas statute, Kan. Stat. Ann. § 15-204 (applying to cities of the third class, such as the City of Edwardsville). *Cheek,* 514 F. Supp. 2d at 1255-56.

On appeal, plaintiffs assert that they participated in the investigation conducted by the Kansas AG as citizens, not as police majors, so their speech falls outside *Garcetti*'s purview and is entitled to constitutional protection. They argue that they did not initiate an investigation, interview witnesses, or otherwise gather evidence regarding City officials' illegal conduct. They further contend that their

contact with the AG's office was not part of their job duties and was not included in their job descriptions. For their breach-of-contract claims, plaintiffs maintain that the district court erred in holding that the severance provisions were not enforceable because they were enacted by resolution, rather than by ordinance. They point out that the City set the salaries of many City employees by resolution.

Standards of Review

"We review the district court's grant of summary judgment for the City de novo, applying the same legal standard as the district court." *Shero v. City of Grove,* 510 F.3d 1196, 1200 (10th Cir. 2007). Summary judgment is proper when "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). "Furthermore, because this case involves the First Amendment, we have an obligation to make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression." *Brammer-Hoelter v. Twin Peaks Charter Acad.,* 492 F.3d 1192, 1201 (10th Cir. 2007) (quotation omitted). We also review de novo the district court's application and interpretation of Kansas state law. *Copeland ex rel. Copeland v. Toyota Motor Sales U.S.A., Inc.,* 136 F.3d 1249, 1250 (10th Cir. 1998).

Discussion

Among plaintiffs' challenges to the summary judgment on their First Amendment claims is their contention that the district court failed to give adequate consideration to this circuit's recent application of *Garcetti* in *Casey v. West Las Vegas Independent School District,* 473 F.3d 1323 (10th Cir. 2007). Plaintiffs assert that in *Casey* this circuit developed a distinction between an internal-agency report, which is not protected speech, and a report to an outside investigative agency, which commands constitutional protection. But even assuming for the sake of argument that the Kansas AG's office qualified as an outside agency in this case, *Casey* does not stand for the blanket proposition that any report to an outside agency is entitled to protection under the First Amendment.

In *Casey,* the plaintiff was the superintendent of schools who also supervised the state's Head Start Program. She directed a subordinate to report violations of the Head Start qualifying-income regulations to the federal Head Start agency, and she reported violations of the state open-meetings law to the state attorney general. 473 F.3d at 1326. Because the report to the Head Start agency was part of the plaintiff's job responsibilities, it was not entitled to First Amendment protection. *Id.* at 1329-32. In contrast, her report to the attorney general of open-meetings violations "fell sufficiently outside the scope of her office to survive even the force of the Supreme Court's decision in *Garcetti.*" *Id.* at 1332-33.

Plaintiffs argue that intra-agency reporting is not protected, while a report to an outside agency is protected, but *Casey*'s rationale was based not on the nature of the agency, but on the nature of the plaintiff's job duties. Having reviewed *Casey* in light of plaintiffs' claims, we conclude that the district court's failure to discuss *Casey* in a substantive manner is not reversible error because, as explained above, *Casey* does not support plaintiffs' argument that it is the nature of the agency that determines whether the speech at issue is protected.

As for plaintiffs' remaining arguments, we have carefully considered them in light of the record on appeal, the parties' briefs, and the relevant law. Applying the standards set out above, we conclude that plaintiffs have not identified any reversible error in this case. Accordingly, we affirm the district court's comprehensive and thorough orders granting summary judgment in favor of defendants for the reasons stated in its published memoranda and orders filed August 24, 2007, and October 1, 2007, *Cheek,* 514 F. Supp. 2d 1220; *Cheek,* 514 F. Supp. 2d 1251, as well as in its unpublished order filed November 21, 2007, denying plaintiffs' motion to alter or amend the judgment.

Conclusion

The judgment of the district court is AFFIRMED.

Entered for the Court

John C. Porfilio
Circuit Judge

APPENDIX

B. Determining Job Duties: *Casey* Leads the Way. This Court's decision in *Casey* illustrates the distinction between job-related speech and protected speech and, in doing so, gives significant definition to the general statements of *Garcetti* on how an employee's job duties shape her constitutional rights. In *Casey*, the Court of Appeals found some speech of a high-ranking government employee to outside agencies constitutionally protected under *Garcetti* and some unprotected, thereby broadly assaying the issue. The *Casey* court specifically held that a school superintendent enjoyed First Amendment protection for statements she made to the New Mexico Attorney General's office concerning the district's failure to comply with the state open meetings law. *Casey*, 473 F.3d at 1332-33. The court recognized that although Casey was the top appointed employee of the district, serving at the pleasure of the elected school board, she had no identifiable job duties pertaining to meeting compliance and, thus, her external statements fell outside the rule of *Garcetti*. *Id.*

Casey, however, also alleged that she had been discharged because of reports she made regarding the district's Head Start program, a federal project

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[. . .] did not deprive the teacher of free speech protection. Similarly, Cheek and Doty became aware of the wrongdoing through their employment. But the test for constitutional protection focuses on how the information is disseminated, not on how it is acquired.

assisting children in low-income households. Casey had been designated under federal regulations as the program's chief executive officer. In that capacity, Casey had the job-related tasks of insuring compliance with the governing regulations and remediating deficiencies. Casey became aware that a significant number of ineligible children participated in the district's program. After reporting the problem to the school board, Casey directed one of her subordinates to make a report to the federal agency overseeing Head Start.

This Court held that, given Casey's designation as CEO of the district's Head Start program and the specific duties attendant to that position, her reporting to the federal government was sufficiently job related to be without First Amendment protection. *Casey*, 473 F.3d at 1330-31. The Court carefully distinguished its holding from the run of cases in which public employees speak to outside agencies and pointed to the "rather narrower and subtler set of facts" defining Casey's job as the overseer of the Head Start program. *Id.* Indeed, the Court's analysis of Casey's communication with the New Mexico Attorney General about the open meetings violations provides an apt counterpoint illustrating the more common scenario.

Cheek and Doty's communications are legally comparable to Casey's statements to the state attorney general on the open meetings violations, rather than to her report to the federal government on the Head Start irregularities. As discussed more fully

below in examining the erroneous reasoning of the district court's ruling, Cheek and Doty acted in the same way private citizen witnesses would have; they answered questions put to them by investigators. They had not and did not initiate an investigation, interview witnesses, or otherwise gather evidence to find out if Edwardsville officials had broken the law. Defendants point to no evidence suggesting that the communication came within the job duties Cheek and Doty performed as majors in the Edwardsville police department. In that respect, their communication is decidedly *unlike* Casey's reporting to the federal government, which grew directly out of her particularized job functions as the designated CEO of the local Head Start program. Likewise, neither Cheek nor Doty ordered subordinates to perform any tasks associated with their communication with the Attorney General's investigators. The *Casey* Court found the superintendent's delegation of some of the actual reporting about Head Start to an underling to be strong evidence of the job-related nature of that activity. There is no comparable evidence upon which to base summary judgment here.

The trial court's ruling here arguably could stand if it might fairly be said that *Garcetti* would have stripped ADA Ceballos of free speech protection for answering questions from the California Attorney General's office as part of an investigation into whether DA Garcetti fixed cases for political supporters or friends. But nothing in the Supreme Court's decision or its application in the lower courts would

endorse such a sweeping denial of free-speech rights to public employees. To the contrary, the *Garcetti* majority suggests a public employer might adopt policies "receptive to" workers' reporting misfeasance internally, thereby encouraging that communication despite its lack of constitutional protection, in preference to an employee's speaking outside the organization. *Garcetti*, 547 U.S. at 424. The Court's suggestion indicates by strong negative implication that a public employee's statements made outside the organization generally retain traditional First Amendment protection, and the Court cites *Pickering* as an illustration. *Id.*

In *Green v. Board of County Com'rs*, 472 F.3d 794, 801 (10th Cir. 2007), this Court underscored *Garcetti's* focus on communication between employees and their superiors in the course of "official business" in delineating unprotected speech. Conversely, the *Green* decision recognized that *Garcetti* did not displace constitutional protection of public employees speaking "with newspapers or . . . legislators or performing some similar activity afforded citizens[.]" *Id.* at 800. This Court developed precisely that distinction in *Casey* to hold public employee communications with outside investigative agencies, such as a state attorney general, commonly command constitutional protection.

C. Other Circuits' Authority Would Protect Cheek and Doty. Opinions from other circuit courts issued since *Garcetti* similarly retain free-speech protection in way this Court has done in *Casey*. Most

analogously, the Ninth Circuit held that a female prison guard engaged in protected speech when she voiced complaints to a state senator and later during an Inspector General's investigation to the effect that inmates were not punished for directing highly provocative sexual activity toward her and other women. *Freitag v. Ayers*, 468 F.3d 528, 545 (9th Cir. 2006) ("[Freitag's] right to complain both to an elected public official and to an independent state agency is guaranteed to any citizen in a democratic society regardless of his status as a public employee."). Although Freitag worked in a

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No. 08-1295

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SUPREME COURT, U.S.

In The

Supreme Court of the United States

JEFFREY CHEEK AND ALVIN DOTY,

Petitioners,

v.

THE CITY OF EDWARDSVILLE, KANSAS; JOHN BROMAN; JENNIFER BURNETT; TIM KELLY; DOUG SPANGLER AND LLOYD BETH,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

OPPOSITION TO A PETITION FOR WRIT OF CERTIORARI

ROGER W. WARREN*
WILLIAM P. DENNING
SANDERS WARREN AND RUSSELL, L.L.P.
40 Corporate Woods
9401 Indian Creek Parkway, Suite 1250
Overland Park, Kansas 66210
Telephone: (913) 234-6100

**Counsel of Record*

Attorneys for Respondents

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

COUNTERSTATEMENT OF QUESTION PRESENTED

The First Amendment precludes the State from conditioning public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression. In *Garcetti v. Ceballos*, 547 U.S. 410 (2007) this Court held that when a public employee speaks pursuant to his or her official duties their speech is not protected by the First Amendment. The narrow question presented by this case is:

Whether the First Amendment affords protection to speech by a law enforcement officer where the law enforcement officer communicates with an outside law enforcement agency, consistent with his official duties, concerning alleged criminal conduct by his superior officer and city officials of which the officer has personal knowledge due to his position as a law enforcement officer.

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STATEMENT

1. This matter arises out of the termination of Petitioners Jeffrey Cheek and Alvin Doty's employment with the Edwardsville, Kansas municipal police department. The district court granted summary judgment in favor of Respondents on Petitioners' claims under 42 U.S.C. § 1983 for alleged violations of their First Amendment rights. Pursuant to this Court's precedent in *Garcetti v. Ceballos*, 547 U.S. 410 (2007), the district court found that Petitioners' speech was made pursuant to their official duties as law enforcement officers and, therefore, was not constitutionally protected. The Tenth Circuit affirmed the judgment of the district court.

2. Petitioners Jeffrey Cheek and Alvin Doty were each employed as majors by the Edwardsville, Kansas police department. (App. 11-12). Doty had been employed as a police officer in the Edwardsville police department for approximately eleven years, holding a number of positions including detective. (App. 12). Petitioner Cheek was employed by the Edwardsville police department for four years and served as a uniformed officer as well as the narcotics officer. Petitioners were each promoted to the rank of major in 2004. (*Id.*).

As majors, Petitioner Doty oversaw the detectives in the Edwardsville police department and Petitioner Cheek oversaw the uniformed officers. (App. 14). Petitioner Cheek's job duties included training and mentoring the sergeants and reestablishing a

strong chain of command and accountability. (*Id.*). Petitioners could and did serve as the chief of police in his absence. (*Id.*).

In addition to their supervisory responsibilities, Petitioners continued to perform traditional law enforcement duties including conducting criminal investigations and making arrests as majors with the police department. (App. 14). Petitioners also would conduct internal affairs investigations of other police officers in the Edwardsville Police Department. (App. 14-15).

3. On occasions, Petitioners Doty and Cheek sought the assistance of and worked with outside law enforcement agencies if the City did not have the resources necessary to complete a criminal investigation. (App. 13). Petitioner Doty sought assistance from outside law enforcement agencies for polygraph examinations and on two occasions sought the assistance of the Federal Bureau of Investigation (FBI) in narcotics investigations. (*Id.*). Petitioners also worked with outside law enforcement agencies in relation to certain internal affairs investigations Petitioners were responsible for conducting. (App. 15).

While majors, Cheek and Doty went to the FBI and requested that the FBI conduct an investigation into allegations of illegal and improper conduct by Edwardsville Police Officer Sheila Rogoza that were outside the realm of an internal affairs investigation but more in the realm of criminal public corruption. (App. 15). Cheek and Doty provided information to

the FBI regarding the alleged illegal activities of Officer Rogoza, and cooperated with and assisted the FBI in relation to this investigation. (App. 15-16). Doty believed it was his official duty as a police officer and as a major with the Edwardsville police department to take the allegations concerning Officer Rogoza to the FBI. (App. 16).

Cheek and Doty also conducted an internal affairs investigation of Sergeant James Marble concerning allegations that Sergeant Marble interfered with the investigation involving Officer Rogoza. (App. 16). The assistance of an outside law enforcement agency again was solicited, and the Leawood, Kansas police department assisted Cheek and Doty in this internal affairs investigation. (*Id.*).

4. As recognized by Petitioner Doty, a police officer with knowledge of possible criminal conduct has a duty to report that conduct to someone so that it may be investigated. (App. 18). This duty to report criminal conduct includes official misconduct by another officer even if the potentially criminal conduct involves a superior officer. (*Id.*). Specifically, during his deposition, Petitioner Doty testified:

> Q: And so, as part of your duties as a police officer that worked for the Edwardsville Police Department for over 10 ½ years, if you knew official misconduct by a superior officer with the Edwardsville Police Department, you would take that information to whatever the appropriate authority might be; correct?

A: I would report that information, yes.

Q: When you find or the DUI case file was found and the citation was found in Chief Vaughan's desk, part of your official duties as major with the police department of Edwardsville, since it involves your superior officer [it is] to go to an outside law enforcement agency that can investigate that possible criminal conduct; correct?

A: Yes.

Q: And that is what you guys did; correct?

A: Yes.

(App. 18).

Petitioner Doty not only recognized the existence of these official duties as a police officer, he candidly admitted that he followed these duties when carrying out his employment as a police officer and major with the Edwardsville police department. (App. 18-19).

5. In late 2005 or early 2006, Cheek was present when a case file related to a driving under the influence charge (DUI case file) was discovered in Chief Vaughan's desk drawer by the secretary for the police department, Melynda Harbour. (App. 17). The case file had previously been reported as missing. (*Id.*). Cheek later learned that the case file Harbour discovered was the same DUI case file that had been previously reported as missing. (*Id.*). According to Petitioner Cheek, the DUI case file had all the

"writings of impropriety on it," and he believed something improper was going on. (*Id.*). Although the DUI ticket was generally outside the realm of internal affairs and involved possible public corruption, it was similar to the allegations and information against Officer Rogoza that Petitioners had taken to the FBI. (App. 15-17).

The discovery of the DUI ticket and the appearance of impropriety demanded that Cheek and Doty, as majors with the Edwardsville police department and as part of their official duties, report the discovery of the DUI ticket to the appropriate outside authorities for investigation. (App. 18). The Edwardsville police department standard operating procedure provides in relevant part:

> Complaints alleging improper police conduct, brutality or misconduct involving several personnel or supervisor personnel will be handled as an internal affairs matter and shall be investigated at the direction of the Chief of Police. . . . **If there is probable cause to believe that an employee has committed a criminal offense, the district attorney's office will be notified and an outside agency will be requested to assist in completing the investigation for the proper jurisdiction.** [Emphasis added.]

(App. 15).

Cheek and Doty had nowhere to go other than an outside law enforcement agency to request an

investigation of their superior officer, the chief of police. (App. 17-18). Cheek believed that the attorney general's office would be the appropriate agency for investigating possible corruption involving Chief Vaughan and the DUI case file. (App. 18).

6. In early January 2006, Sergeant Hammontree issued a speeding ticket to Councilman Tim Kelly's brother. (App. 19). That same day, Councilman Kelly mentioned the ticket to Sergeant Hammontree. (*Id.*). Later Councilman Kelly spoke to Chief Vaughan about how the speeding ticket could be reduced to a non-moving violation. (App. 19). Chief Vaughan later told Councilman Kelly that the ticket had been taken care of or fixed. (*Id.*). Sometime after his discussion with Councilman Kelly, Sergeant Hammontree checked on the status of the ticket and he could find no record of it with the Edwardsville municipal court. (*Id.*).

Sergeant Hammontree discussed this information with Petitioners – his immediate supervisors and superior officers in the police department. (App. 19). During a meeting in Petitioner Cheek's office at the police department, Petitioners shared with Hammontree, a subordinate officer, that Chief Vaughan had discussed in a meeting with Petitioners, among others, another incident involving Councilman Tim Kelly where councilman Kelly had allegedly attempted to influence a cocaine arrest. (*Id.*). Petitioners showed Hammontree a memorandum prepared by Chief Vaughan to Doug Spangler, then the city commissioner, regarding the incident. (App. 22). Petitioners and Sergeant Hammontree also discussed

the apparent failure to process DUI tickets as well as what outside law enforcement agency would be the appropriate agency to investigate the disappearance of traffic and DUI citations, interference with internal affairs investigations and interference with arrests. (App. 19-20).

Petitioner Cheek and Hammontree discussed the district attorney's office – the outside agency identified in the police department's standard operating procedure for investigating potential criminal conduct by police officers – as a potential outside agency to conduct the investigation. (App. 20). However, they dismissed the district attorney's office because of perceived political influence by Edwardsville city officials on the office. (*Id.*). They decided not to contact the FBI or other federal agencies because they did not believe that the allegations involved a federal crime. (*Id.*). Ultimately, they decided that the appropriate agency to contact, if necessary, was the Kansas Attorney General's office. (*Id.*).

In early 2006, the Edwardsville Fraternal Order of Police (FOP) sent a letter addressed to the Mayor, city council and city administrator regarding allegations of potentially illegal or improper conduct by city officials and/or employees. (App. 20). In February, the FOP sent a letter to the Kansas Attorney General's office requesting an investigation of the allegations of official misconduct. (*Id.*). John Henre and Terry Hammontree, both officers with the police department and members of the FOP, traveled to Topeka, Kansas on February 13, 2006 and requested that the

attorney general's office investigate the allegations of official misconduct. (App. 20-21).

7. In February 2006, the attorney general's office began conducting an investigation into allegations of potentially illegal and improper conduct by Edwardsville employees and city officials. (App. 21). In late February or early March, Tom Williams, a representative from the attorney general's office, met Cheek at the Edwardsville police department. (*Id.*). This meeting was not very long. At the time Cheek was acting as the chief of police as Chief Vaughan was on a leave of absence. Prior to his termination, Cheek provided information to investigators about the missing DUI case. (App. 21). Prior to giving inquisition testimony in June 2006, Cheek also provided information to the attorney general's office regarding Councilman Robert Lane having work done on his house for free, Councilman Tim Kelly asking Chief Vaughan to influence a cocaine charge, and Councilman Kelly apparently having Vaughan fix a speeding ticket issued to Kelly's brother. (*Id.*). Doty also met with investigators from the attorney general's office on five to six occasions and provided similar information to the investigators.

Doty felt that as a major with the Edwardsville police department that he and any other police officer had a duty to cooperate in the investigation by the Kansas Attorney General's office. (App. 34).

8. In April 2006, Cheek was suspended from the Edwardsville police department following several

months of tumultuous events. (App. 23). These events included Petitioner Cheek making a racially charged statement to an African American detainee. (*Id.*). Cheek admitted to telling the detainee that they still hang horse thieves in Kansas and that law was still on the books. Cheek also verbally attacked the city administrator, Doug Spangler, prior to a specially called city council meeting. (App. 23). Cheek's verbal assault on the city administrator was such that city council members present for the specially called meeting could hear Petitioner Cheek threatening and yelling at the city manager from behind a closed office door. The city council voted 3 to 1 to terminate Cheek's employment following this altercation.

Alvin Doty's employment with the police department was terminated in September 2006 following repeated acts of insubordination and refusal to follow orders given by new chief of police Lloyd Beth. (App. 23). Doty's insubordination included refusing to patrol areas of Edwardsville, failing to return the keys to his patrol car as ordered, and refusing to wear the appropriate police uniform. (App. 23). The city council voted unanimously to terminate Doty's employment.

Cheek and Doty each filed suit under 42 U.S.C. § 1983 alleging that the City terminated their employment in retaliation for their involvement in the Kansas Attorney General's investigation. In granting summary judgment in favor of Respondents, the district court stated:

> The court cannot envision any view of the facts in which these instances of speech [by Cheek and Doty] would not be considered to have reasonably contributed to or facilitated their performance of their duties to investigate criminal conduct and perform IA [internal affairs] investigations.

(App. 32). In so stating, the district court recognized that Petitioner Doty specifically testified that they had a duty to cooperate in the investigation and that, although their speech involved an unusual predicament of reporting alleged misconduct by fellow law enforcement officers and the misconduct of city employees and officers, their speech owed its existence to the activities the City paid Petitioners to perform – investigating and reporting criminal conduct and performing internal affairs investigations. (*Id.*). The Tenth Circuit Court of Appeals affirmed, finding that Petitioners speech was made pursuant to their official duties. (App. 73-74).

9. Petitioners misrepresent the record to this Court in two fundamental and key respects. First, Petitioners state: "No police department investigation was begun. Cheek and Doty neither assembled evidence nor interviewed possible witnesses." (Pet. 4). In support of this purported fact Petitioners cite to the order and judgment of the Tenth Circuit found at page 4 of the appendix. However, a review of the opinion reveals that this purported fact was not found by the district court or the court of appeals. Rather, the record reveals that the reference is merely the

Tenth Circuit summarizing Petitioners' argument on appeal that they spoke as witnesses because "they argue that they did not initiate an investigation, interview witnesses or otherwise gather evidence." This argument both on appeal and now does not find support in the record. Cheek testified at his deposition:

> Q: So you would agree with me that it would have been unacceptable or inappropriate for you to conduct an investigation of Chief Vaughan?
>
> A: No. I said it would be unacceptable for us to complete the whole investigation. . . . It would be less than proper for us to, on just something hearsay, to go to the Attorney General's office and say, hey, we hear these rumors. . . . If there was enough indication that would come to me to say, hey, your superiors are doing something wrong, while it's a terribly uncomfortable situation, I would have to determine whether there is enough for an investigation to be warranted through some type of initial fact-finding myself to even know if it's worthwhile.
>
> At that point, then I would ask somebody from the outside to do what we don't do, which is public corruption, which is either FBI, KBI or Attorney General, and in this case, Doug Spangler used to brag about knowing people in the KBI. Really wasn't a great option

> just to go to the KBI and say, hey, one of your friends might be up to something . . .

This testimony by Cheek was specifically cited in the district court's opinion finding Petitioners spoke pursuant to their official duties. (App. 17).

Petitioners further misrepresent the record by indicating that state investigators "interviewed numerous witnesses including Cheek, Doty and Harbour." (Pet. 5). Again this purported fact cannot be reconciled with the record before the Court. It is undisputed that Cheek spoke with investigators from the attorney general's office at the Edwardsville police department during one brief meeting in February/March 2006. Who was responsible for initiating this conversation, Cheek or the outside investigator, is unknown. This fleeting conversation hardly qualifies as a witness interview as suggested by Petitioners. Although Cheek subsequently spoke with investigators on other occasions, again, who was responsible for initiating these conversations and the specific substance and purpose of the conversations are not revealed in the record. The circumstances of Doty's conversations with outside investigators are equally as vague. What is revealed by the record is that these communications occurred pursuant to Petitioners' official duties as police officers and majors with the Edwardsville, Kansas police department.

REASONS FOR DENYING THE PETITION

Summary

Although public employees do not surrender all their First Amendment rights by reason of their public employment, when a citizen enters government service, the citizen must, by necessity, accept certain limitations on his or her freedom of speech. *See Waters v. Churchhill*, 511 U.S. 661, 671 (1994). Therefore, in analyzing claims under the First Amendment, courts much reach a balance between the interests of the employee, as a citizen, to comment on matters of public concern, and the interests of the State, as an employer, in promoting the efficiency of the public services it performs through its employees. *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, Will City*, 391 U.S. 563, 568 (1968).

Historically, the analysis of claims brought by public employees for alleged violation of their First Amendment rights was a twofold inquiry: (1) did the employee speak as a citizen; and (2) did the employee's speech address a matter of public concern. *Pickering*, 391 U.S. at 574; *Connick v. Myers*, 461 U.S. 138, 147 (1983). This Court altered the traditional analysis required in First Amendment free speech cases brought by public employees in *Garcetti v. Ceballos*, 547 U.S. 410 (2006). *Garcetti* recognized that, although a public employee does not surrender all of his First Amendment rights by reason of their public employment, speech made pursuant to the employee's professional duties is not constitutionally

protected. 547 U.S. at 421. In so holding, this Court recognized that the First Amendment is not offended where a public employer regulates speech made pursuant to an employee's official duties. *Id.* at 426. A number of circuit courts have recognized that the "official duties" analysis of *Garcetti* added an additional inquiry to First Amendment analysis articulated in *Pickering* and *Connick*. *See e.g. Green v. Bd. Of County Comm'rs*, 472 F.3d 794, 798 (10th Cir. 2007); *Williams v. Dallas Indep. Sch. Dist.*, 480 F.3d 689 (5th Cir. 2007); *Mills v. City of Evansville, Indiana*, 452 F.3d 646 (7th Cir. 2006).

However, Petitioners urge this Court to accept this matter for review because, generally, Petitioners spoke to an outside investigative agency as witnesses and the Tenth Circuit's application of *Garcetti* conflicts with the approach taken by other circuits. The Petition should be denied pursuant to *Garcetti* as the record before the district court and the circuit court established that Petitioners spoke pursuant to their official duties as police officers and majors with the Edwardsville, Kansas police department.

Petitioner Doty candidly admitted that the majors had an official duty to cooperate and provide information in relation to the attorney general's investigation. The communications at issue were communications that were expected to be performed and in fact had been performed by Petitioners on similar occasions. Moreover, the subject matter of the communications by Petitioners was consistent with and related to their recognized and undisputed job

duties – investigating crime, conducting internal affairs investigations, supervising other officers and making arrests. Free speech is not implicated where a public employee is simply performing the job duties they were expected to perform. *Garcetti*, 547 U.S. 410.

I. Petitioners' speech was made pursuant to their official duties as police officers and majors.

As this Court noted, "Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen." *Garcetti*, 547 U.S. at 421. When employees make statements pursuant to these professional responsibilities, the employee is not speaking as a citizen for First Amendment purposes and their speech is not protected. *Id.* While *Garcetti* did not articulate a comprehensive framework for defining the scope of an employee's duties, this Court did provide lower courts with some guidance in determining whether an employee's speech is made pursuant to his or her official duties. The inquiry is a "practical one" that should focus on "the duties an employee is actually expected to perform." *Id.* at 424-25.

Petitioners deviate from the practical inquiry recognized by this Court in *Garcetti*, and instead focus on narrow and misleading arguments unsupported by the record to urge this Court to revisit the

official duties doctrine of *Garcetti*. Petitioners contend that their speech in this case is entitled to protection because Petitioners simply spoke as witnesses in the investigation conducted by the Kansas Attorney General's office into allegations of malfeasance by city officials.

Contrary to Petitioners' position, however, this case does not require or call for this Court to clarify its decision in *Garcetti* and outline the comprehensive framework that was absent for determining whether speech was made to an employee's official duties. A practical inquiry of the record before the trial court and court of appeals leaves little question that the speech at issue was made pursuant to Petitioners' official duties as police officers and majors with the Edwardsville, Kansas police department. This practical inquiry is a fact intensive one and deference to the district court's factual determinations is appropriate. *Foraker v. Cheffinch*, 501 F.3d 231, 240-41 (3rd Cir. 2007); *Freitag v. Ayers*, 468 F.3d 528 (9th Cir. 2006).

Both the district court as well as the Tenth Circuit determined that based upon the record before the court, Petitioners spoke pursuant to their official duties as police officers and majors. The most conclusive evidence establishing that Petitioners spoke pursuant to their official duties is their own uncontroverted testimony. During his deposition, Doty repeatedly and unequivocally testified that, as a major and police officer, he and Cheek had an official duty to cooperate in the investigation being conducted by the Kansas Attorney General's office. Doty

candidly admitted that this duty applied to all police officers and that the police officers had a duty to provide information to the attorney general's investigators if approached. Doty further testified that this official duty extended to the DUI case file discovered in Chief Vaughan's desk. Doty testified that following the discovery of the case file, the majors had an official duty to take that information to an outside law enforcement agency to be investigated. That is exactly what they did in this case.

Reporting the discovery of the DUI case file and other allegations of impropriety to an outside investigative agency was also consistent with the Edwardsville police department standard operating procedure. Petitioners, as police officers, were obligated to follow, if not to the letter, the spirit of these procedures. The standard operating procedure provided that information concerning criminal conduct of an officer was to be reported to the district attorney's office for investigation. It was, and is, undisputed that Cheek and Doty were responsible for conducting internal affairs investigations pursuant to the standard operating procedure. Considering that Chief Vaughan was apparently involved in the disappearance of the speeding ticket, it is axiomatic that allegations of his own impropriety could not be taken to him for an internal affairs investigation. Additionally, Petitioners did not feel they could take the allegations to the district attorney's office as dictated in the standard operating procedure because of city manager Douglas

Spangler's perceived influence on the district attorney's office.

Based upon the nature of the allegations and perceived influence of city officials, Petitioners decided it would be prudent not to specifically follow the standard operating procedure. Rather, in conjunction with Sergeant Hammontree, a subordinate officer, they determined an alternative course of action based upon the circumstances and facts known to Petitioners and made consistent with their official duties and the spirit of the standard operating procedures of the police department. As noted by the district court: "[Petitioners'] discussions with Sergeant Hammontree were geared toward determining how best to handle the alleged improprieties from a professional standpoint." Petitioners' uncertainty or confusion as to how to handle the situation, as it did not fall squarely into the confines of the standard operating procedure, does not establish that they were not acting pursuant to their official duties as police officers. *See Morales v. Jones*, 494 F.3d 590, 597 (7th Cir. 2007).

The careful consideration given by Petitioners as to the appropriate agency to investigate the allegations of misconduct by both the chief of police as well as elected officials evidences that these decisions were made as part of their official duties as police officers and superior officers providing guidance to a subordinate officer. Petitioner Cheek was Sergeant Hammontree's superior officer and was responsible for mentoring the sergeants. Petitioners' conversations with Sergeant Hammontree occurred in

Petitioner Cheek's office at the police department. This conversation was well within their official duties as Sergeant Hammontree's supervisory officers. *See id.* (holding that communications between police officers regarding allegations that superior officers had harbored a felon were not protected by the First Amendment as it occurred as a result of their official duties). There is little question Cheek and Doty were acting pursuant to and consistent with their official duties.

In an attempt to shroud their communications with constitutional protections and remove them from the ambit of their official duties, Petitioners in conclusory fashion contend they were merely witnesses in the attorney general's investigation – no different from witnesses in any other criminal investigation. Petitioners' conclusory statement ignores the overwhelming evidence in the record and their own candid admissions revealing that Petitioners had engaged in similar speech on other occasions in their official capacity as police officers and majors, and considered their speech in this case to have occurred pursuant to their official duties.

The Petition is devoid of any substantive discussion regarding Doty's testimony that he: (1) spoke pursuant to and consistent with his official duty as a police officer and major, and (2) police officers with the Edwardsville police department had an official duty to cooperate and provide information in relation to the attorney general's investigation. Petitioners also fail to substantively distinguish their actions and

communications in relation to the attorney general's investigation from their traditional job duties as police officers – investigating crime, making arrests and working with outside law enforcement agencies. It is noteworthy that Petitioners devote a single paragraph of their Petition (p. 19) to the discussion of their official duties. Rather than focus on their admitted job duties, Petitioners argue that they spoke as witnesses because they did not perform any investigation into the allegations or interview witnesses – admittedly traditional official duties of a police officer. The record belies this contention.

Cheek testified during his deposition that he would not have taken allegations to the attorney general's office without conducting some type of fact finding investigation. The record establishes that Petitioners did in fact conduct such a fact finding investigation, albeit limited in scope.

It is uncontroverted Cheek and Doty discussed with Chief Vaughan allegations that Councilman Timothy Kelly allegedly attempted to influence a cocaine arrest. Petitioners later discussed with Sergeant Hammontree the disappearance of a speeding ticket issued to Councilman Kelly's brother. Petitioners then chose to discuss with Sergeant Hammontree, a subordinate officer, the allegation that Councilman Kelly had also allegedly attempted to influence a cocaine arrest, and showed him a memorandum regarding that incident that had somehow come into their possession. During these discussions, Petitioners discussed with Sergeant Hammontree possible

outside agencies to investigate this potentially criminal conduct. They determined that the appropriate outside law enforcement agency to investigate these issues was the attorney general's office.

This conduct by Petitioners was consistent with the fact finding Cheek described as an appropriate response to allegations involving his superior officer, and certainly an ordinary citizen would not have the means and could not conduct such a fact finding investigation.

The fact that Petitioners' investigation was limited in scope also does not remove Petitioners' communications from the scope of their official duties. A full blown investigation by the Edwardsville police department was neither possible nor warranted. First, Petitioners' superior officer was directly involved in the issues involving the disappearance of the DUI ticket and alleged interference with a traffic ticket. Petitioners testified that they had no place to go but an outside law enforcement agency because the allegations involved the potentially illegal conduct of their superior officer. Cheek further testified that when the DUI ticket was discovered in Chief Vaughan's desk, it had all the writing of impropriety on it, and Cheek believed that something improper was going on even without any additional investigation. Doty admitted it was necessary to take the matter to an outside agency for investigation immediately upon finding the DUI case file. It was necessary to take it to an outside agency because that is what their official duties demanded of them. Petitioners

had engaged in similar conduct, in their official capacity as law enforcement officers and majors, on at least two other occasions.

The uncontroverted evidence before the district court was that Petitioners had engaged in similar activities when conducting an internal affairs investigation of other officers that revealed potentially illegal conduct. This included working with and sharing information with an outside investigative agency (the Federal Bureau of Investigation) about possible public corruption by a fellow officer, and interviewing a fellow officer about possible criminal conduct – similar to Petitioners' conversations with Sergeant Hammontree. Petitioners' conduct in communicating with the Kansas Attorney General's investigator concerning possible criminal conduct embraced the work and tasks Petitioners were paid to perform and had performed in other instances.

Moreover, unlike ordinary citizen witnesses, Petitioners learned certain information they ultimately provided to the attorney general's office as a direct result of their positions as majors. These matters included the citation issued to Councilman Kelly's brother, the alleged interference with a narcotics arrest, conversations and memorandum by Chief Vaughan regarding this incident, and the discovery of the DUI case file in Chief Vaughan's desk. This was all information that was not generally known or available to the public, and was available to Petitioners as a result of their official positions within the police department. "There is no relevant analogue to

speech by citizens who are not government employees," as Petitioners' official positions allowed them access to information they otherwise would not have been privy to, and as a result, their disclosure of this information implicated their official job duties. *Garcetti*, 547 U.S. at 424. *See Tamayo v. Blagojevich*, 526 F.3d 1074, 1092 (7th Cir. 2008) (recognizing that reporting misconduct against an agency over which one has general supervisory responsibility is part of the duties of such an office).

The fact that Petitioner Cheek was acting pursuant to his official duties, whether implied or explicit, when he met with and provided information to the attorney general's investigators is further buttressed by the fact that Petitioner Cheek was the acting chief of police at the time he met the investigator in the police department. Chief Vaughan took a leave of absence from the police department around the time the Attorney General's investigation began in mid-February 2006. Cheek's meeting with investigators occurred at the police department in late February or early March. At that time, Cheek was the acting chief of police. One of the functions of the chief of police is to direct any investigation of allegations of police misconduct. When Cheek met with investigators, Cheek was simply performing one of his job duties as acting chief of police – working with the outside law enforcement agency that was conducting an investigation involving alleged police misconduct. In taking the practical view of an employee's job duties as instructed by *Garcetti*, circuit courts have

recognized that an employee with significant and comprehensive responsibility for policy formation and implementation certainly has a greater responsibility to speak to a wider audience on behalf of the government unit. *Tamayo*, 526 F.3d at 1092.

The parallels between *Garcetti* and this matter support denying the Petition. In *Garcetti*, Ceballos, a calendar deputy in the district attorney's office, was approached by a defense attorney about inaccuracies in an affidavit that had been used to obtain critical search warrants. Ceballos investigated and determined there were inaccuracies that were unresolved after consultation with the affiant. He informed his supervisors, and prepared a memorandum concerning the inaccuracies and recommending dismissal of the case. Ceballos also met with the affiant and his supervisors to discuss the case. After being called as a defense witness, Ceballos was reassigned, transferred to another courthouse and denied promotion. Ceballos sued claiming violation of his First Amendment rights. It was undisputed that Ceballos' actions were carried out pursuant to his official duties as a calendar clerk.

In rejecting Ceballos' First Amendment claims, the Court noted the controlling factor was Ceballos' job duties as to whether he spoke as a citizen or pursuant to his public employment. *Garcetti*, 547 U.S. at 421.

> Ceballos did not act as a citizen when he went about conducting his daily professional

> activities, such as supervising attorneys, investigating charges, and preparing filings. . . . When he went to work and performed the tasks he was paid to perform, Ceballos acted as a government employee. The fact that his duties sometimes required him to speak or write does not mean his supervisors were prohibited from evaluating his performance.

Garcetti, 547 U.S. at 422.

Similarly, Petitioners did not act as citizens when they investigated possible criminal conduct by the chief of police and council members, interviewed or spoke with their subordinate officers regarding the subordinate officers' knowledge of any such criminal activity, determined the appropriate outside agency to take the allegations of criminal conduct to pursuant to the department's standard operating procedure, and then shared what information they possessed about the criminal conduct with that investigative agency. The actions by Petitioners were not "peripheral irregular or even unique activities" as suggested by Petitioners. Rather, the record reveals that they were similar to activities Petitioners performed on other occasions in their official capacities.

Admittedly, Cheek and Doty's speech with outside investigators was not an enumerated job duty of a police officer with the Edwardsville police department. However, this Court specifically rejected such a bright line test in determining whether a public employee spoke pursuant to his official duties. *Garcetti*, 547 U.S. at 424. As recognized by Petitioners, speech

falls outside the First Amendment if it embraces the job duties the employee was hired to perform. *Id.* at 421. A practical inquiry focuses not on enumerated job duties, but rather on "the duties an employee is actually expected to perform" and does perform. *Id.* at 424-25.

The fact that Petitioners may have exceeded their formal job descriptions does not mean that their actions were not within the scope of their duties. *Foraker v. Chaffinch*, 501 F.3d 231, 242 (3rd Cir. 2007). The record establishes that Petitioners' communications in this case were the type of duties Cheek and Doty were expected to and did in fact perform as police officers and majors with the police department.

Petitioners further attempt to distinguish their conversations with outside investigators by likening these conversations to testimonial statements that are traditionally afforded constitutional protection. Petitioners' reliance is misplaced.

Traditionally, truthful testimony is protected under the First Amendment and *Garcetti* did not alter the protection afforded to such testimony. *See Reilly v. City of Atlantic City*, 532 F.3d 216 (3rd Cir. 2008). Here, however, Petitioners were not placed under oath when they spoke with investigators. Doty never provided sworn testimony in the investigation and Cheek did not testify as a witness at an inquisition, hearing or trial prior to the termination of his employment. The circuit decisions holding that sworn,

truthful testimony is protected are unavailing in this case.

Moreover, the information provided by Cheek and Doty to investigators was not accurate or apparently truthful. A key factor in recognizing that testimony is protected is its truthfulness. *Reilly*, 532 F.3d at 230. Petitioners contend, in a footnote, that the "thrust of the information was correct" simply because Councilman Robert Lane had received free carpeting related to the failure to prosecute the DUI ticket discovered in Chief Vaughan's desk. However, the allegations against Councilman Kelly regarding the alleged influencing of a cocaine arrest and interference with a traffic citation proved to lack veracity. Cheek and Doty provided information to representatives of the attorney general's office despite the apparent falsity of this information. The fact that this information was false undermines the fact that it should be afforded constitutional protections.

Public employees, such as law enforcement officers, often occupy trusted positions in our society. *Garcetti*, 547 U.S. at 419. Public "employers have a heightened interest in controlling speech made by employees in his or her official capacity. Official communications have official consequences. . . . Supervisors must ensure that their employee's official communications are accurate, demonstrate sound judgment and promote the employer's mission." *Id.* at 422-23.

Here, Cheek and Doty occupied positions in the Edwardsville police department that placed them in a supervisory role over other officers. In this role, they discussed information with a subordinate officer, Sergeant Hammontree, regarding an elected city official (Councilman Kelly) that ultimately proved false. Cheek and Doty then discussed this false information with an outside investigative agency. They discussed this information with both Sergeant Hammontree as well as representatives from the attorney general's office in their official capacity as majors. Cheek discussed this information while acting as the chief of police at the police department. Under *Garcetti* and its progeny, certainly the City of Edwardsville and its elected officials have an interest in ensuring that employees holding supervisory positions do not lie with impunity or repeat unsupported and baseless allegations simply because they disagree with the policies established by the elected officials. Such irresponsible and reckless communications by public employees are not protected by the First Amendment, and the Petition should be denied.

II. Communications with outside investigative agencies are not entitled to greater constitutional protection or scrutiny than other communications by public employees.

Petitioners cleverly and ingeniously craft the position that their communications are entitled to

constitutional protection or greater scrutiny under the First Amendment because their communications were with an outside investigative agency. Petitioners contend that the Tenth Circuit Court of Appeals substituted and then rejected an inferior First Amendment argument for the one actually presented by Petitioners. However, a review of the Petition and the arguments advanced by Petitioners in support, reveals that the position presented by Petitioners both on appeal and now before this Court was precisely the issue properly rejected by the Tenth Circuit Court of Appeals – whether a communication that involves an outside investigative agency is constitutionally protected simply because the communication was not internal. The source of this newly found First Amendment analysis is undefined and unsupported.

Petitioners, in essence, argue that the content and context of their communications with outside investigative agencies is irrelevant in determining whether their speech is to be afforded constitutional protection. Rather, Petitioners argue that the identity of the individual(s) to whom their communications were directed, i.e., an outside agency, is the sole determinative factor of whether their speech is afforded constitutional protection. (Pet. 19-20, 28). In other words, under Petitioners' analytical framework, if accepted, a public employee's external communications are entitled to greater constitutional protection than internal communications. This Court has refused to recognize such an artificial and arbitrary

distinction, and Petitioners candidly admit that such a position is infirm and legally unsupported. (Pet. 12). Yet, this is precisely the argument advanced by Petitioners.

Simply because an employee speaks at work does not mean that the speech is unprotected. *See Garcetti*, 547 U.S. at 420-21. Conversely, simply because an employee's speech occurs outside the workplace does not mean that the speech is constitutionally protected. *See City of San Diego, California v. Roe*, 543 U.S. 77 (2004) (holding that police officer's speech outside workplace was not constitutionally protected and did not require *Pickering* balancing). The location where the speech at issue occurs, i.e., inside the workplace versus outside the work place, is not dispositive of whether the speech is protected under the First Amendment. *Garcetti*, 547 U.S. at 420.

Respondents do not suggest, and the Tenth Circuit did not hold in affirming summary judgment in this case, that whether communications are internal or external is not a factor to be considered in conducting the official duties analysis. To the contrary, the Tenth Circuit in *Casey v. West Las Vegas Indep. Sch. Dist.*, 473 F.3d 1323 (2007) recognized that internal and external communications – concerning identical subject matter – could be both protected speech and unprotected speech.

In *Casey*, the superintendant of the West Las Vegas School District and chief executive officer of the district's Head Start program complained to the

school board as well as federal agencies that a significant percentage of families enrolled in the Head Start program exceeded the federal income guidelines. Casey also complained to the school board as well as the state attorney general's office that the school board's meeting practices violated the New Mexico Open Meetings Act. The Tenth Circuit held that Casey's communications both with the school board and with outside federal agencies regarding the lack of compliance with federal regulations were made pursuant to her official job duties as CEO of the Head Start program, and therefore, were not protected. The court further recognized that Casey's internal complaints to the school board regarding the Open Meetings violations were made pursuant to her official duties; however, her complaints to the attorney general's office regarding this same subject matter were not made pursuant to her official duties and were protected under the First Amendment.

In analyzing Casey's speech, the Tenth Circuit recognized that the critical inquiry is the nature, substance and purpose of the communications by the public employee in relation to their job duties. *Casey*, 473 F.3d at 1329-30. The Tenth Circuit outlined the framework for analyzing speech by public officials in light of *Garcetti* in both *Casey* and *Green v. Bd. of County Comm'rs*, 472 F.3d 794 (10th Cir. 2007). This framework consists of looking at (1) the content of the particular speech at issue; (2) the scope of the employee's designated job duties; and then, (3) an assessment as to whether the speech at issue stems

from the types of activities the employee is paid to do. This approach is appropriate under both *Garcetti* and traditional First Amendment analysis.

Despite the addition of the official duties analysis occasioned by *Garcetti*, First Amendment jurisprudence has historically required courts to determine whether an employee spoke as a citizen on a matter of public concern. *See Connick*, 461 U.S. at 1690. Traditionally, in order to determine whether a public employee spoke on a matter of public concern, the inquiry focused on the content, form and context of the employee's speech in light of the entire record. *Id.* Since *Garcetti*, lower courts have employed this same analysis – content, form and context – to determine whether an employee speaks pursuant to his or her official job duties. *See Boyce v. Andrew*, 510 F.3d 1333 (11th Cir. 2007).

Casey recognizes that whether the communication at issue is internal or external is but one of a myriad of factors analyzed in considering whether the speech occurred pursuant to an employee's official duties. 473 F.3d at 1329-30. As Petitioners recognize, *Casey* "is perhaps the most instructive opinion from any circuit addressing *Garcetti's* job duty standards for assessing protected speech of public employees." (Pet. 37). Yet, Petitioners would ignore the teachings of *Casey* and *Garcetti* and instead focus the inquiry on an artificial distinction between internal and external communications.

In support of this interpretation, Petitioners contend the approach taken by the Tenth Circuit effectively strips a police officer witnessing physical abuse of an arrestee of the protections afforded by the First Amendment in a civil rights investigation by the Justice Department. This argument highlights the fundamental flaw underlying Petitioners' analysis of this decision as well as the decisions of various other circuit courts applying *Garcetti*. Petitioners would protect such communications simply because the communication involved an outside agency.

However, under *Garcetti* and its progeny, the municipal police officer's communications with the FBI or Justice Department are not protected simply because they involved outside agencies. Rather, the communication would be protected because it did not occur pursuant to the police officer's official duties. Municipal police officers' official duties do not include the investigation or enforcement of federal or state civil rights legislation. Therefore, a police officer who communicates with the Justice Department or the FBI would enjoy the same constitutional protections as any other citizen (including the garbage truck driver or the resident as posited by Petitioners in their hypothetical discussion) who may witness such an event and provide information to the authorities investigating a civil rights violation.

To the contrary, a municipal police officer's official duties do generally include the investigation and enforcement of alleged violations of state and municipal criminal statutes. Petitioners concede that

their job duties consist of making arrests and investigating criminal conduct, including internal affairs investigations involving potentially criminal conduct, including internal affairs investigations involving potentially criminal conduct of other police officers. The fact that an officer speaks with outside agencies pursuant to these official job duties does not ensconce their communications with constitutional protection under the First Amendment.

The Third Circuit refused to recognize an arbitrary distinction between internal and external communications in *Foraker v. Chaffinch*, 501 F.3d 231, 240-41 (3rd Cir. 2007) (holding that state troopers' communications with state auditor investigating closure of firing range due to health and safety issues fell within scope of official duties and were not protected). Even those cases that have held that communications with outside agencies are protected recognize that the proper inquiry focuses on the nature of the plaintiff's job duties in relation to the communication and not the nature of the agency with whom the communications are made. *See Freitag v. Ayers*, 468 F.3d 528 (9th Cir. 2006) (holding that female correction officer's complaints of sexual harassment to state senator and office of inspector general did not fall within her official job duties).

Petitioners cite to a plethora of decisions from other circuits and suggest that that the Tenth Circuit's decision in this case represents an excessive expansion of the official duty analysis set forth in *Garcetti*. Most notably, Petitioners cite the Fifth

Circuit's opinion in *Davis v. McKinney*, 518 F.3d 304 (5th Cir. 2008) and the Eighth Circuit's decision in *Lindsey v. City of Orrick*, 491 F.3d 892 (8th Cir. 2007) in support of their broad proposition. However, Petitioners' argument fails to find support in either of these decisions.

Although the Fifth Circuit did note that external communications are ordinarily made as a citizen, the Fifth Circuit recognized that, despite this general rule, it was necessary to look at the employee's role in relation to their job duties to determine whether the communications are protected. *Davis*, 518 F.3d at 314. In *Davis* the court held the speech at issue was protected, but not because it was with an outside agency. Rather, the court relied on the fact that communicating with outside agencies was not within the plaintiff's job functions, and had not occurred in over twelve years plaintiff had held the position of auditor. *Id.* at 316.

Similarly, in *Lindsey*, the Eighth Circuit held that statements regarding sunshine law compliance by the public works director for the City of Orrick were protected under the First Amendment. In so holding, the court recognized that the public works director reported to the city council regarding public works issues; however, "there was no evidence [the director's] job duties even arguably included sunshine law compliance." *Lindsey*, 491 F.3d at 898. The court in *Lindsey* did not even address whether the statements at issue were internal or made to an outside agency.

As discussed *supra*, the record in this case leaves no doubt that Cheek and Doty spoke pursuant to their official duties as police officers and majors with the Edwardsville police department. Even under the narrow approach taken by the Fifth Circuit in *Davis*, the speech at issue in this case would still be without protection as Petitioners failed to establish that their speech did not occur pursuant to their official duties.

Petitioners' misapplication of *Garcetti* is further highlighted by Petitioners' statement that decisions by lower courts post-*Garcetti* represent an "unrecognizable constitutional stew" in no small part due to the majority's failure to specifically outline the analytical framework for the additional inquiry of job relatedness in *Garcetti*. What Petitioners perceive as incongruous and disparate results are not the result of any improper application of *Garcetti* by the lower courts or a lack of direction by this Court; rather, it is the "necessary product of the 'enormous variety of fact situations which critical statements by . . . public employees may be thought by their superiors to furnish grounds for dismissal." *Garcetti*, 547 U.S. at 418 (citing *Pickering*, 391 U.S. at 569).

Garcetti represented a fundamental and significant change in First Amendment analysis by requiring a determination at the outset of whether a public employee's speech was a result of their official duties. *Williams v. Dallas Indep. Sch. Dist.*, 480 F.3d 689 (5th Cir. 2007); *Casey*, 473 F.3d at 1328. If the answer to this question is yes, whether the speech

involved a matter of public concern becomes irrelevant and the speech is not protected. *Id.* Since *Garcetti*, circuit courts have repeatedly recognized that speech by public employees traditionally protected under the First Amendment was no longer subject to constitutional scrutiny if it was the result of an employee's official job duties. For example, exposing government inefficiency and misconduct have traditionally been matters of considerable significance. *See Garcetti*, 547 U.S. at 425. Since *Garcetti*, however, circuit courts have held that these traditional matters of public concern, although protected under traditional *Connick/Pickering* analysis, may no longer be protected speech by public employees if the speech is the result of the employee's official duties. *See e.g. Phillips v. City of Dawsonville*, 499 F.3d 1329 (11th Cir. 2007).

While these results may seem incompatible with long standing First Amendment jurisprudence, this Court recognized that such inequities and irregularities might occur. *Garcetti*, 547 U.S. at 425. In doing so, this Court stated:

> The dictates of sound judgment are reinforced by the powerful network of legislative enactments – such as whistleblower protection laws and labor codes – available to those who seek to expose wrongdoing. . . . These imperatives, as well as obligations arising from any other applicable constitutional provisions and mandates of criminal and civil laws, protect employees and provide checks on supervisors who would

> order unlawful or otherwise inappropriate actions.

Id.

Such safeguards were available to Petitioners and this Court need not create the superficial distinction between internal and external communications urged by Petitioners in this matter. Such a distinction is neither necessary nor supported in First Amendment jurisprudence.

III. The Court of Appeals properly reviewed the issues presented in this matter.

The final issue raised by Petitioners in support of their Petition is that the Tenth Circuit failed to give proper consideration to the record before the court and the arguments raised by Petitioners on appeal. Apparently, this argument is erroneously premised on the underlying assumption that if the Court of Appeals would have reviewed the entire record it would have reached a different conclusion. In essence, Petitioners cry foul because they are unhappy with the result and decisions both at the district court and at the Court of Appeals.

However, as discussed in detail, *supra*, the record in this case establishes that Cheek and Doty spoke with investigators from the attorney general's office pursuant to their official duties. This result is supported not only by Tenth Circuit precedent but also this Court's decision in *Garcetti*. When an employee is

simply performing his or her job duties, there is no competing balance between the employee's speech and its consequences; therefore, strict scrutiny of the speech at issue is not necessary. *Garcetti*, 547 U.S. at 423. To hold otherwise would be to demand permanent judicial intervention in the conduct of governmental operations to a degree inconsistent with sound principles of federalism and the separation of powers. *Id.*

Petitioners' additional argument that the Court of Appeals substituted an inferior argument for the argument actually presented by Petitioners is also unavailing. As discussed *supra*, Petitioners both at the court of appeals and now before this Court argued that their communications are protected because the communications were with an outside agency. The Court of Appeals properly rejected this argument as the records reveals that Petitioners' communications, both internal and external, were consistent with and the result of their official duties.

Contrary to Petitioners' position, the Court of Appeals considered the arguments of Petitioners and rejected those arguments. In affirming the judgment of the trial court, the court of appeals specifically stated in its order: "As for plaintiffs' remaining arguments, we have carefully considered them in light of the record on appeal, the parties' brief and the relevant law . . . we conclude that plaintiffs have not identified any reversible error in this case." The court of appeals, pursuant to its constitutional mandate weighed all the issues and arguments on appeal, and

correctly found that summary judgment was proper based upon existing law. Simply because Petitioners disagree with the result does not establish that the court of appeals abdicated its constitutional duty to review the record.

CONCLUSION

Petitioners have failed to demonstrate that the decision of the court of appeals is erroneous, misapplies the law or is inconsistent with recognized constitutional principles. Therefore, the Petition should be denied.

Respectfully submitted,

ROGER W. WARREN

and

WILLIAM P. DENNING

(3)

No. 08-1295

Supreme Court, U.S.
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In The

Supreme Court of the United States

JEFFREY CHEEK AND ALVIN DOTY,

Petitioners,

v.

THE CITY OF EDWARDSVILLE, KANSAS; JOHN BROMAN; JENNIFER BURNETT; TIM KELLY; DOUG SPANGLER; AND LLOYD BETH,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

REPLY BRIEF

G. GORDON ATCHESON
Counsel of Record
THE ATCHESON LAW OFFICE
4800 Rainbow Blvd., Suite 6
Westwood, Kansas 66205
(913) 362-8650

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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REASONS THE PETITION SHOULD BE GRANTED

1. Circuit Split on Free Speech Rights. In their opposition to the petition for writ of certiorari, Respondents tacitly concede the appellate courts have divided over how to apply the job-relatedness limitation on the free-speech rights of public employees announced in *Garcetti v. Ceballos*, 547 U.S. 410, 421-22 (2006). Those divisions continue to fracture the law defining First Amendment protections for government employees. Because of both the importance of those constitutional rights and the disagreements among the lower courts in identifying protected speech since *Garcetti*, this Court should grant the petition to add much needed depth and dimension to the analysis of job-relatedness. Respondents do not dispute the significance of the fundamental constitutional rights implicated here. Nor could they. And they do not suggest review to be unnecessary by showing the lower courts have uniformly interpreted *Garcetti*. Again, they could not. The appellate courts apply *Garcetti* without continuity or even coherence across the circuits. Pet. at 24-26.

Instead, Respondents attempt to trowel over the sound bases for granting the petition with a diffuse rendition of the summary judgment record that simultaneously omits contextually pertinent facts and belabors points largely irrelevant on certiorari. This case actually presents an especially appropriate vehicle for amplification of the standards governing whether a public employee's speech relates to her job

duties in a way that precludes First Amendment protection. The issue was central to the outcome below and, hence, to the questions presented here.

The district court entered summary judgment against Petitioners Cheek and Doty based solely on a determination their speech lacked constitutional protection under *Garcetti* because it ostensibly related to their jobs. App. 35-36. Moreover, the trial court recognized that the factual record would have allowed Cheek and Doty to present their case to a jury under the pre-*Garcetti* analysis of public employee free speech claims. *Cheek v. City of Edwardsville*, 514 F.Supp.2d 1236, 1245-46 (D. Kan. 2007) (decision in companion case). *See also* Pet. at 9 n.3 (*Pickering-Connick* analysis described). The Court of Appeals affirmed simply by rejecting the notion that a public employee automatically receives constitutional protection if she communicates with an outside agency or entity, although Cheek and Doty never relied on that facile argument. App. 6-7. Cheek and Doty actually argued that speech communicated outside the employing governmental unit *typically* receives First Amendment protection and that nothing required a different result in their case. *See Davis v. McKinney*, 518 F.3d 304, 313 (5th Cir. 2008); *Freitag v. Ayers*, 468 F.3d 528, 545 (9th Cir. 2006), *cert. denied*, 549 U.S. 1323 (2007). In short, this case turns on the issue of job-relatedness under *Garcetti*. Moreover, the scenario here – municipal employees communicating as witnesses with investigators from an outside government agency – reflects one of the most extreme

deprivations of First Amendment protection exacted in the name of *Garcetti*. Pet. 14, 26-27. Respondents neither dispute that characterization nor offer any examples to refute it.

2. Respondents Rest on Misdirection. Lacking a compelling rejoinder, Respondents choose to muddle the factual record here. They try to portray Cheek and Doty as having undertaken an official Edwardsville police department investigation into municipal corruption only to then hand off the probe to the Kansas Attorney General's office. But that is incorrect. The Edwardsville police union initially contacted the Edwardsville City Council about the official misfeasance. App. 20-21. As majors in the police department, Cheek and Doty did not belong to the union, and the organization did not represent them. App. 24. When the City Council took no corrective action, two union officials went to the Attorney General's office. App. 20-21. The Attorney General initiated the investigation. App. 12, 21. Cheek and Doty then communicated with those investigators many times. Cheek continued to meet with representatives of the Attorney General's office even after he was fired on May 8, 2006; he gave sworn testimony to the investigators in June.[1] App.

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[1] Cheek testified at what is known as an inquisition. Under state law, the Kansas Attorney General or a local prosecutor may convene an inquisition upon order of a judge to investigate potential crimes. Witnesses can be subpoenaed to appear in a closed meeting – the inquisition – to give sworn testimony to the

(Continued on following page)

21. Those ongoing contacts reflect the investigators' interest in Cheek as a witness and not merely in his official capacity as a major or acting chief in the Edwardsville police department. Doty had similar communications with the investigators, but did not testify.

Respondents point out that the Edwardsville police department sometimes began criminal or internal affairs investigations only to join with another law enforcement agency to finish the work. But those circumstances are not analogous. For example, as the district court noted, what started as an internal affairs investigation of a subordinate officer eventually was turned over to the Federal Bureau of Investigation with the chief's approval. App. 15-16 (Rogoza matter). At the City Council's insistence, the police department called in a detective from a neighboring municipality to complete an internal affairs investigation of another officer. App. 16 (Marble matter). In this instance, however, the Edwardsville police department had begun no corruption investigation and did not seek outside assistance to do so. Rather, the union representatives – not ranking police department officers – went to the Attorney General to share what they knew in the hope the State would act. Cheek and Doty spoke with the Attorney General's office only after the State had begun its

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prosecutor. *See* K.S.A. 22-3101, et seq. An appearance does not suggest guilty knowledge, but merely knowledge.

investigation. And then they spoke as witnesses, not as coordinating investigators tracking down leads or gathering evidence.

Nothing in *Garcetti* would suggest that a public employee lacks free speech protection when communicating as a witness in an investigation launched by an outside government agency. To the contrary, given this Court's overarching precept that public employees retain First Amendment rights when they engage in speech comparable to that of private citizens, Cheek and Doty should have received constitutional protection here. *See Garcetti*, 547 U.S. at 421-22; *id.* at 423-24. Speaking as a witness is not unique to government service.

As Cheek and Doty noted, Pet. 8, the trial court placed considerable weight on Doty's deposition testimony that he believed as a police officer he had a duty to cooperate with the Attorney General and to oppose the municipal corruption in Edwardsville, App. 34. Respondents repeatedly sound that cry to resist review here. Their argument, however, illustrates nicely the difficulties the *Garcetti* decision cultivated with its truncated discussion of job-relatedness. First, of course, Doty's testimony may be taken to refer to a "duty" in the sense of a moral obligation. *See* Merriam-Webster Collegiate Dictionary, 11th Ed., 2003 ("duty," def. 3b "the force of a moral obligation"). But that is not a duty in the *Garcetti* sense. Rather, a job-related duty entails a task a government employee has been paid to perform. *Garcetti*, 547 U.S. at 22. *See* Merriam-Webster

Collegiate Dictionary ("duty," def. 2a "obligatory tasks, conduct, service, or functions that arise from one's position (as in . . . a group)"). Moreover, Respondents argue that "this duty applied to all police officers and that the police officers had a duty to provide information to the attorney general's investigators if approached." Op. 17. But a blanket duty applied wholesale to government employees reflects precisely the sort of artificially inflated job-relatedness the *Garcetti* majority found unacceptable. *Garcetti*, 547 U.S. at 424 ("We reject, however, the suggestion that employers can restrict employees' rights by creating excessively broad job descriptions."). Respondents then seem to contradict – or at least revise – themselves later by suggesting "a police officer who communicates with the Justice Department or the FBI would enjoy the same constitutional protections as any other citizen." Op. 33. They argue that should be so because state and municipal law enforcement officers do not enforce federal law. *Id.* Thus, according to Respondents, *all* local law enforcement officers have a job duty to cooperate with State criminal investigations but not with federal criminal investigations. An Edwardsville police officer witnessing the abuse of a prisoner would have no constitutional protection for speaking with investigators from the Kansas Attorney General looking into a violation of K.S.A. 21-3425 prohibiting law enforcement officers from mistreating a person involuntarily detained; yet, that officer would be shielded by the First Amendment for talking to FBI agents pursuing a criminal civil rights violation under 18 U.S.C. § 242 based on

the same incident. (And what if representatives of both agencies conducted a single interview as part of a joint investigation?) The *Garcetti* decision does not, to any outward appearance, allocate the free speech rights of public employees with that kind of bureaucratic formalism.

Again, to avoid dealing with the obvious division among the lower courts in applying *Garcetti*, Respondents incorrectly suggest that the job-relatedness of a public employee's speech depends on how that employee acquires the information she disseminates. Op. 22. If the employee learns of the information in the workplace, Respondents argue she enjoys no constitutional protection regardless of how publication occurs. *Id.* They even incorporate that notion into their counterstatement of the question presented. *Id.* at i. Respondents cite *Garcetti*, 547 U.S. at 424, but the decision offers no support. To the contrary, *Garcetti*, fairly read, rejects the argument. The majority cites the facts of *Pickering v. Board of Education of Township High School District*, 391 U.S. 563 (1968), as illustrating protected speech of a public employee. *Garcetti*, 547 U.S. at 423. There a schoolteacher wrote a letter to the editor commenting on an upcoming bond issue vote. The letter plainly included information the teacher acquired directly through his work. *Pickering*, 391 U.S. at 576-77 (letter recounts statements superintendent made to teachers suggesting punitive action against those opposing the bond, observes that few teachers actually supported earlier letters to the editor favoring the bond issue, and

outlining specific deficiencies in one high school that ought to be corrected before the district raises money for athletic fields). *See also Charles v. Grief*, 522 F.3d 508, 513 (5th Cir. 2008) ("To hold that any employee's speech is not protected merely because it concerns facts that he happened to learn while at work would severely undercut First Amendment rights."). Moreover, this Court has recognized that public employees command free speech protection, in part, precisely because their vantage point within the government affords them a particular insight into institutional issues and shortcomings. *Waters v. Churchill*, 411 U.S. 661, 674 (1994). *See also Garcetti*, 547 U.S. at 419-20 (acknowledging the societal benefits of government employee speech of that type).

Respondents repeatedly fall back on the "practical inquiry" phrase drawn from *Garcetti* to bolster their claim that Cheek and Doty acted within their job duties when they recounted what they knew about municipal corruption to the Attorney General's investigators. *Garcetti*, 547 U.S. at 424 ("The proper inquiry [into job-relatedness] is a practical one."). But "practicality" alone fails as a predictive or analytical test; it is more of an empty vessel to be filled as a given court (or advocate) chooses. *Compare Trigillo v. Snyder*, 547 F.3d 826, 829 (7th Cir. 2008) (court invokes "practical inquiry" to reject "core functions" as too narrow a test for job-relatedness under *Garcetti*) *with Marable v. Nitchman*, 511 F.3d 924, 933 n.13 (9th Cir. 2007) (court cites "practical inquiry" to

find chief engineer on ferry had job duty limited to the safety of the boat's mechanical systems).

In short, Respondents' arguments simply sidestep the reasons the petition should be granted. In applying *Garcetti*, the lower courts have opted for differing tests of job-relatedness, meaning the free speech rights of government employees have greater vitality in some places than in others. Measuring those constitutional protections unequally from circuit to circuit and courthouse to courthouse offends sophisticated jurisprudence and plain good sense.

3. Circuit Split Continues to Widen. Since Cheek and Doty filed their petition, the Fifth Circuit has reiterated its view that *Garcetti* "merely carved out a narrow exception" to the traditional analysis of public employee free speech cases. *Rangra v. Brown*, 566 F.3d 515, 523 n.23 (5th Cir. 2009). The Fifth Circuit earlier had decided to look at a public employee's "core" work functions as a means of applying job-relatedness under *Garcetti*. *Davis*, 518 F.3d at 315. The Ninth Circuit also leans toward defining job duties narrowly. *Marable*, 511 F.3d at 933 & n.13. Conversely, the Seventh Circuit has specifically rejected reliance on an employee's "core" duties as too narrow. *Davis v. Cook County*, 534 F.3d 650, 654 (7th Cir. 2008). And the Tenth Circuit aligns with the Seventh by taking a broad view of job-relatedness to strip away free-speech rights. *Brammer-Hoelter v. Twin Peaks Acad.*, 492 F.3d 1192, 1203 (10th Cir. 2007). *See also*, Pet. at 23-25 (discussing circuit division); App. 29-33 (trial court relies heavily

on *Brammer-Hoelter* in entering summary judgment on Cheek and Doty's First Amendment claims).

Again, since Cheek and Doty filed their petition, the Eleventh Circuit issued a split decision denying free speech protection to county employees who told their supervisors the county had failed to properly record and report sewer overflows in violation of the Clean Water Act. *Abdur-Rahman v. Walker*, 567 F.3d 1278 (11th Cir. 2009). The majority adopted a broad interpretation of job-relatedness and implied *Garcetti* held open free speech protection for government employees only as a rare exception. *Id.* at 1285 (The majority opinion rejects measuring constitutional protection by an employee's "everyday job functions" because "[t]he Supreme Court explained that public employees *'retain some possibility of'* constitutional protection when they 'make public statements outside the course of performing their official duties . . . [.]' ") (quoting *Garcetti*, 547 U.S. at 423-24) (emphasis added). The dissent contends the majority "relie[d] on an overly broad reading of *Garcetti* . . . to deny First Amendment protection" to the employees. *Id.* at 1291 (Barkett, J., dissenting).

The Ninth Circuit, however, has since held that a police sergeant reporting misconduct of his colleagues to their supervisors and higher-ranking officials within the department properly averted summary judgment on a claim for violation of his free-speech rights. *Robinson v. York*, 566 F.3d 817, 823-24 (9th Cir. 2009). The trial and appellate courts found the scope of the officer's job duties for *Garcetti* purposes could not be

decided as a matter of law on those facts. *Id.* That result cannot be easily reconciled with *Abdur-Rahman*, the summary judgment entered against Cheek and Doty here, or Respondents' argument imposing on all police officers a *Garcetti* duty to speak as witnesses in internal or external investigations of misconduct. As Cheek and Doty have pointed out, even after *Garcetti*, the courts typically extend free speech protection to public employees communicating with outside government agencies. *Davis*, 518 F.3d at 313 ("external communications are ordinarily not made as an employee, but as a citizen"); *Lindsey v. City of Orrick, Missouri*, 491 F.3d 892, 895, 898 (8th Cir. 2007); *Freitag*, 468 F.3d at 545.

CONCLUSION

This case directly presents the question of how best to determine whether public employees' speech relates to their job duties and, hence, garners free speech protection. This Court deliberately left the question unanswered in *Garcetti*. Some three years later, the need for further guidance on that issue has become apparent. Accordingly, the petition should be granted.

Respectfully submitted,

G. GORDON ATCHESON